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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 337

WESTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 80) is reported in 196 F. 2d 933.

The order and opinion of the Civil Aeronautics Board (R. 67-68) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1952, and an order extending the time within which to file a petition for writ of certiorari to and including September 16, 1952, was entered by Mr. Justice Clark on August 1, 1952 (R. 85). The petition for a writ of certiorari was filed on September 15, 1952. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 646(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has authority under Section 401(h) of the Civil Aeronautics Act to suspend temporarily the petitioner's authority to serve two points covered by its certificate on findings that (a) the public convenience and necessity require a local type air service at the suspended points, El Centro, California, and Yuma, Arizona, (b) the public convenience and necessity require such type of service to be rendered by an independent local service carrier rather than by the petitioner Western, a trunkline carrier, and (c) the traffic available at the suspended points is inadequate to support both a trunkline type service by the petitioner and a local type air service.

2. In the event that the petitioner is not barred from judicial review of Constitutional questions which it failed to raise before the Board, whether the temporary suspension of its certificate author-

ity to serve El Centro and Yuma involves a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution.

STATUTES INVOLVED

The pertinent sections of the statutes involved are fully set forth in the Appendix, *infra*, pp. 16-20.

STATEMENT

This case arises out of a consolidated administrative proceeding before the Civil Aeronautics Board involving the determination of the local air service needs of the Los Angeles-Phoenix area and the route pattern best adapted to meet those needs, a problem the Board has been attempting to resolve for a decade.[1] The petitioner Western had been certificated to serve the two points involved in this proceeding, El Centro and Yuma, as part of its Route 13, a circular route from San Diego to Los Angeles, via El Centro, Yuma, Palm Springs, Bernardino and Long Beach.[2] The present consolidated proceeding included (1) proceedings under an order of the Board directing the petitioner to show cause why its service at San Bernardino, Palm Springs, El Centro, and Yuma

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[1] The history of the previous consideration is set forth in the Report of the Examiner, appended by the Board to its own opinion (R. 10; 28-31).

[2] Route No. 13 also extended from Los Angeles to Salt Lake City via various intermediate points. Western was authorized to serve El Centro on Route No. 13, in 1943, and Yuma in 1946 (R. 28, 29).

should not be suspended, and directing Arizona Airways, Inc.,[3] to show cause why its authorization to provide service between Phoenix, Arizona, and Yuma should not be suspended; and (2) consideration of applications by Bonanza Airlines, a local service carrier operating a route between Reno, Nevada, and Phoenix, Southwest Airways, a local service carrier within California, and petitioner for certificates to provide Los Angeles-San Diego-Phoenix service (R. 27, 30, 31).

After full public hearings the Board made the following findings:

(1) that the public convenience and necessity require a local type air service between Los Angeles, San Diego, and Phoenix by the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, Ajo and Blythe (R. 14);

(2) that there is insufficient traffic potential at any of the intermediate points to justify service by more than a single carrier (R. 16);

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[3] Arizona Airways, Inc., was subsequently merged into Frontier Airlines, Inc. Frontier is a local air service carrier whose operations extend north and south through the States of Arizona, New Mexico, Colorado, Utah, and Wyoming. Its routes also touch points in Western Texas and Southern Montana. One of its predecessors, Arizona Airways, was certificated to operated between Phoenix and Yuma. However, approval of the merger of Arizona and Frontier was granted by the Board only on condition that operations not be commenced over the Phoenix-Yuma segment (R. 31).

(3) that the needed local service should be provided by an independent local service operator rather than the trunkline carrier Western because (R. 17-21)

(a) the Board has a well-established policy of favoring the award of local service routes to local service carriers and no basis exists for a change of that policy here (R. 17);

(b) the history of Western's service to El Centro and Yuma warrants an adverse conclusion as to Western's willingness to operate a truly local service route. The record shows that these cities are merely secondary points to which adequate service will be rendered only if some other purpose of the carrier is being served (R. 17, 18, 22).[4]

The Board granted Bonanza a local service certificate to serve El Centro and Yuma until December 31, 1952, or until the Board might, either upon its own initiative or upon Bonanza's timely filed application, extend the date of such authority (R. 71). Correspondingly, it suspended Western's authority to serve these points until December 31, 1952, or until the final determination of a timely filed application by Bonanza for renewal of its temporary authority (R. 73).

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[4] The Examiner found that this purpose was an unrestricted San Diego-Phoenix route (R. 63).

On January 28, 1952, Western petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's order. The sole question before that Court was the legal issue of the Board's statutory power to suspend the petitioner's authority to serve the two points involved (R. 87). The sufficiency of the evidence to support the Board's findings was not in issue. The Court of Appeals affirmed the Board's order on May 19, 1952 (R. 80). Western accordingly suspended operations at El Centro and Yuma on July 18, 1952, and Bonanza inaugurated service to these points as a part of the temporary Los Angeles-Phoenix route awarded to it in these proceedings.

ARGUMENT

1. Petitioner's basic contention is that the Civil Aeronautics Board has no power to suspend its trunkline air service at El Centro and Yuma without a supporting finding that the public convenience and necessity do not require *any* air service at these points. This contention finds no support in the language and structure of the Civil Aeronautics Act; it is inconsistent with the administrative regulatory scheme; and it has been uniformly rejected by the Board and the courts.

Section 401(h) of the Act gives the Board express authority "after notice and hearing, [to] alter, amend, modify, or suspend any * * * certificate, in whole or in part, if the public con-

venience and necessity so require * * *".[5] The standard "public convenience and necessity" has of course received extensive administrative and judicial interpretation and application. In addition Section 2 of the Act[6] specifies several factors the Board must consider as being in the public interest: it must look toward the encouragement and development of a sound air transport system properly adapted to the needs of the commerce of the United States, the Postal Service, and the national defense.

Petitioner necessarily acknowledges the general power of the Board under Section 401(h) to order a temporary suspension of a carrier's certificate (Pet. 17). It maintains, however, that the contemporaneous granting of a temporary certificate to Bonanza vitiates the Board's basic finding that the suspension was required by the public convenience and necessity. But the Board's finding, basic to both the suspension of petitioner's certificate and the granting of Bonanza's authority, is that the public convenience and necessity require local air service at El Centro and Yuma and that such service should be performed by local type carriers rather than trunk line carriers. The Board has repeatedly distinguished between the

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[5] 49 U.S.C. 481(h); see Appendix, p. 18, *infra*. The Board may also revoke a certificate for intentional failure to comply with the statute or regulations issued thereunder. *Ibid.* See pp. 11-13, *infra*.

[6] 49 U.S.C. 402; see Appendix, p. 16, *infra*.

type of service offered by local type carriers and by trunk line carriers in determining the needs of "a sound transport system" and the needs of particular localities. See *Caribbean Area Case*, 9 CAB 534, 552-554; *New England Case*, 7 CAB 27, 39-40; *Texas-Oklahoma Case*, 7 CAB 481, 502; *Rocky Mountain States Air Service*, 6 CAB 695, 730-732; *West Coast Case*, 6 CAB 961, 980-981. And, in *United Air Lines* v. *Civil Aeronautics Board*, 198 F. 2d 100 (C.A. 7), the Board had temporarily suspended a trunk line carrier's authority to serve certain points, while renewing a local service carrier's temporary authority to serve the same points. As here, Board action was squarely rested upon the view that the transportation needs would best be rendered by the local type carrier serving alone. In affirming the order of the Board, the Court of Appeals for the Seventh Circuit expressly approved the distinction drawn between the two types of carriers and recognized that it was an appropriate factor to be considered in applying the over-all standard of public convenience and necessity. 198 F. 2d at 107-108.

Petitioner nowhere expressly challenges the reasonableness of this distinction. In view of the scope of the Board's jurisdiction, its express statutory power under Section 416(a)[7] to "establish * * * reasonable classifications * * * of air carriers" for purposes of administration of the Act,

[7] 49 U.S.C. 496(a); see Appendix, p. 19, *infra*.

and its administrative experience in determining air transportation needs, there can be no basis for challenging the principle adopted by the Board and approved by the courts of appeals which have passed upon it. Nor can petitioner challenge the application of the principle to this case.[8] For, as the Board stated (R. 22):

> And both El Centro and Yuma should receive improved service through being served by a local service rather than a trunk carrier. For Bonanza these points represent important traffic centers whose development warrant its best efforts whereas to Western the record indicates they were and are secondary points to which adequate service will be rendered only where some other purpose of the carrier is being served. In this connection, it bears noting that service to these points was only increased from a three times weekly frequency to twice daily after Western was placed on notice that the Board might suspend its authorization to serve the points, and thus adversely affect Western's plan for extension of its route to Phoenix

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[8] Although the petition states (Pet. 5, n. 3) that nothing in the Board's opinion justifies the assertion of the court below that it was unwilling to operate a truly local service, the Board's opinion supports that assertion, both by express statement (R. 17) and by incorporation of and reference to certain portions of the Examiner's Report (R. 17, 61-64).

> The low priority which Western has undoubtedly given to the air transportation needs of these cities does not stem from any inherent hostility to these communities on the part of the carrier but from the fundamental economic fact that a business will ordinarily first seek to exploit the areas of greatest potential profit, leaving the others to some later period of greater relative prosperity. For similar reasons, in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, in the long run, be better served by a local service carrier than by a trunk.

Petitioner's primary justification for its narrow interpretation of the Board's authority is that it is the purpose of the Act to insure stability of routes. But, as the Board early pointed out, the policies reflected in Section 2 (outlining the matters the Board is to consider in determining the public convenience and necessity), clearly indicate that "it was not the congressional intent that the air transportation system of the country should be 'frozen' to its present pattern.'"[9] Such

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[9] *Northwest Air., Duluth-Twin Cities Operation*, 1 C.A.A. 573, 577.

freezing of carriers and routes would be at best only one of the elements in a sound transportation system. The assurance of sound economic conditions and development of areas through proper services contributes far more to the stability of the industry than would the solidification of an administrative judgment, once made, as to the public convenience and necessity.

Petitioner in effect requests this Court to write an opinion expounding on the powers of the Civil Aeronautics Board in determining the public convenience and necessity (Pet. 8-11). Such an opinion or decision is unnecessary in this case, where the Board has acted in accordance with the statutory standards as held by the Court of Appeals for the Ninth Circuit. There is no basis for Western's claims that the Board acted arbitrarily (Pet. 11, 15, 20). It follows that there is no need for further review by this Court.[10]

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[10] Petitioner's alleged statutory inconsistencies are nonexistent. The "grandfather" clause (Section 401(e)(1), 49 U.S.C. 481(e)(1); see Appendix, pp. 17-18, *infra*) represents only a determination of Congress as to the initial air transport system that was to be made subject to the Civil Aeronautics Act. Nothing in Section 401(h) or in any other provision of the Act remotely suggests that "grandfather" operations were in any way exempt from the full regulatory scheme once established. *See United Air Lines* v. *Civil Aeronautics Board*, *supra*.

Nor is the argument (Pet. 17-18) that the Board should have issued an order under Section 404(a) (49 U.S.C. 484(a); see Appendix, pp. 18-19, *infra*), to Western to furnish adequate service at El Centro and Yuma as a condition precedent

2. Western's petition sets forth as one of its specifications of error the rejection by the Court of Appeals of its argument that the removal of Western from El Centro and Yuma amounted to a revocation of Western's certificate to serve those points (Pet. 7).[11] The argument is premised on petitioner's conclusion that the suspension will be continued indefinitely or made permanent and that the Board has carefully used suspension as a device to accomplish a revocation it could not otherwise have ordered. Both the Court of Appeals for the Seventh Circuit in *United Air Lines* v. *Civil Aeronautics Board, supra,* and the court below have rejected this contention. The court below pointed out that the suspension is for a definite term and that at the end thereof the Board must reexamine the situation (R. 82). The

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to action under Section 401(h) more than a variation of the argument that the Board can suspend service only upon "cause," *i.e.*, violation of the Act or regulations. As shown below, pp. 12-14, the suspension of petitioner's certificate was not a revocation for which a violation of the Act is an essential prerequisite. It was a suspension for which the public convenience and necessity is the only criterion. *United Air Lines* v. *Civil Aeronautics Board, supra; Pan American-Grace Airways* v. *Civil Aeronautics Board,* 178 F. 2d 34 (C.A. D.C.). The requirements of the public convenience and necessity for a local service by a sympathetic, enthusiastic and undivided effort, could not be met by any Board order under Section 404(a).

[11] Although this was one of petitioner's principal contentions in the court below (Pet. 3), its petition in this Court contains no argument in support of this alleged error of the court below.

court discussed the many possibilities which may then confront the Board and stated that "it is the merest speculation to say that the suspension order is in substance a permanent revocation" (R. 83). This construction of the Board's action is the only one possible in the light of the statute and the facts.

The point, however, serves to illustrate clearly that the constantly-growing air transport system of this country requires flexibility in its regulation. After some ten years of coping with the problem of best satisfying the air service needs of the Los Angeles-Phoenix area, the Board, after hearing, has decided to test the service of a local carrier in that area. Its experience with the trunk line carrier has been unsatisfactory. But it has reached no permanent conclusion; made no final adjudication. Rather, it has suspended petitioner's certificate and granted Bonanza a temporary certificate to serve the area only until December 19, 1952, or until final determination of a timely filed application by Bonanza for extension. At that time it is to reassess the situation in the light of actual operating experience of the local carrier. Thus, in this proceeding the Board has granted the local carrier a limited time within which it can operate so as to establish a factual basis for extension or termination of that authority. In either event a full hearing will be held, at that time, at which petitioner, as well as all other interested carriers, may participate.

5 U.S.C. 1001(e).[12] In no sense has Western's certificate been revoked at this time.

3. Western specifies as error the holding of the Court of Appeals that Western was barred by Section 1006(e) of the Civil Aeronautics Act[13] from raising in that court the issue of whether the suspension amounted to a taking of Western's property without just compensation contrary to the Fifth Amendment to the United States Constitution. This contention is patently untenable. Petitioner did not present any constitutional issue to the Board. Under Section 1006(e) of the Act it is barred from judicial review of issues not presented to the Board in absence of "reasonable grounds for failure to do so." Petitioner presents no grounds to excuse its failure. In any event, Section 401(j) of the Act[14] provides that "No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility." And petitioner's certificate is necessarily subject to the limitations of the Act under which it was authorized; this of course includes Section 401(h), which confers upon the Board the power to suspend certificates. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 449; *United Air Lines* v. *Civil Aeronautics Board*, *supra*, at 108.

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[12] See Appendix, p. 20, *infra*.

[13] 49 U.S.C. 646(e). See Appendix, pp. 19-20, *infra*.

[14] 49 U.S.C. 481(j).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1952.

APPENDIX

The relevant provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended (49 U.S.C. 401, *et seq.*) are as follows:

Sec. 2.

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Sec. 401(e)(1).

If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act [June 23, 1938] shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Board, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between

the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: * * *.

Sec. 401(h).

The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: * * *.

Sec. 404(a).

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such

air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Sec. 416(a).

The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

Sec. 1006(e).

The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the

Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

The relevant section of the Administrative Procedure Act, 60 Stat. 237, as amended (5 U.S.C. 1001 *et seq.*), is as follows:

Sec. 2(e).

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

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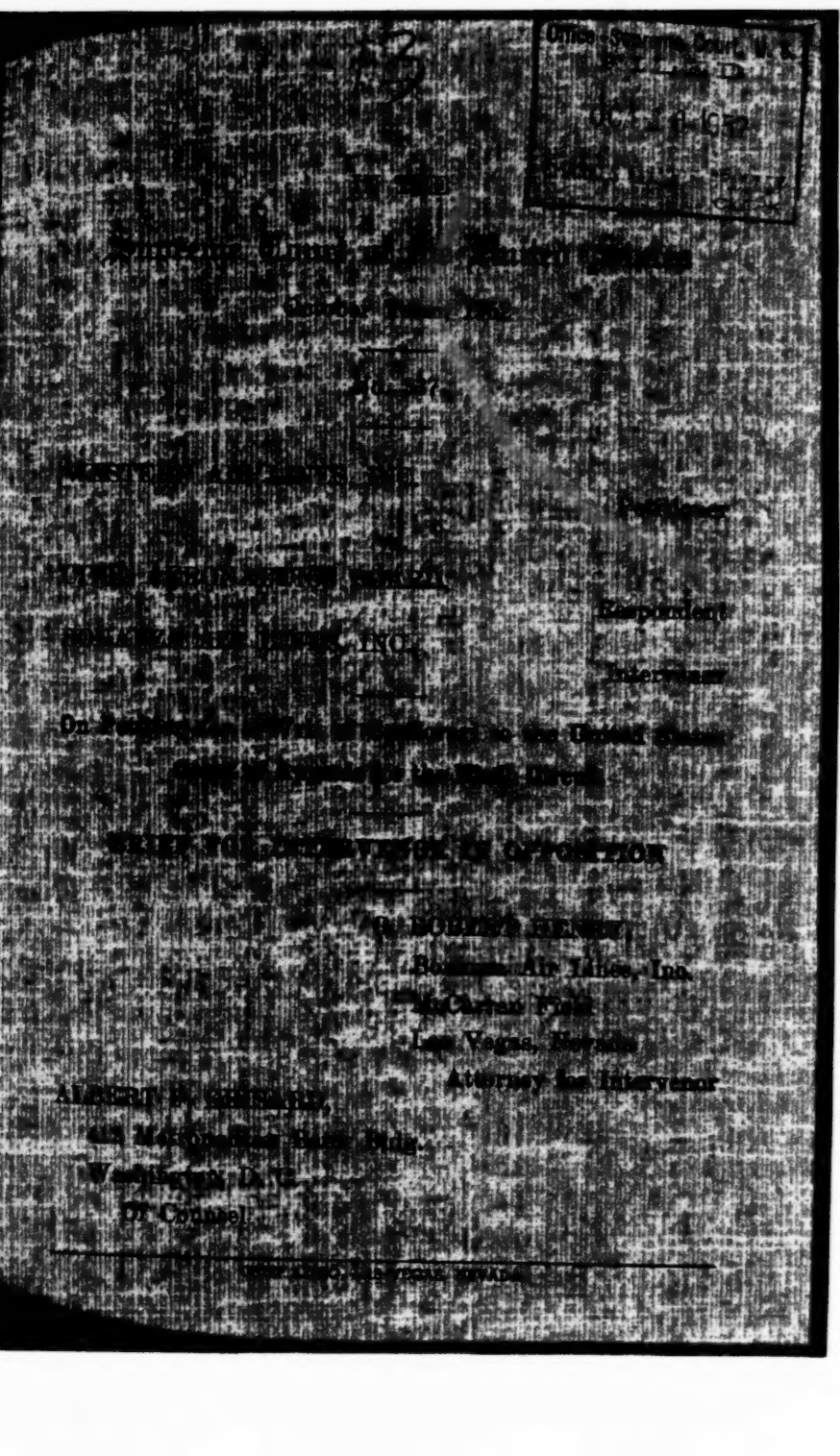

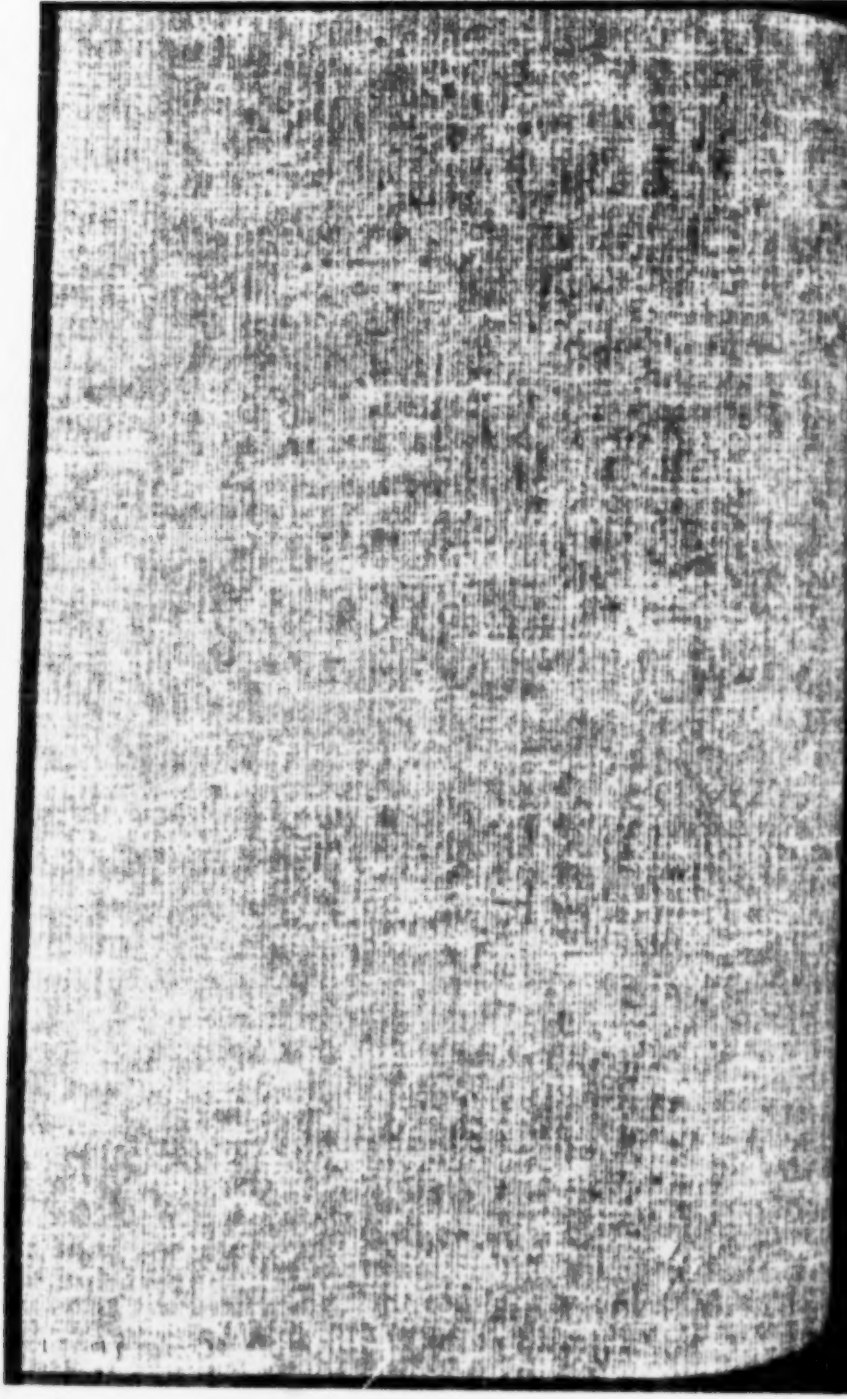

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IN THE

Supreme Court of the United States

October Term, 1952

No. 337

WESTERN AIR LINES, INC.

Petitioner

vs.

CIVIL AERONAUTICS BOARD,

Respondent

BONANZA AIR LINES, INC.,

Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERVENOR IN OPPOSITION

Opinions Below

The decision of the United States Court of Appeals for the Ninth Circuit which Petitioner urges this Court to review is reported in 196 F. 2d 933 and beginning at page 80 of the record of this proceeding.

The opinion and order of the Civil Aeronautics Board,

which were reviewed and affirmed by the U. S. Court of Appeals for the Ninth Circuit, are included in the record of this proceeding commencing at page 6.

Jurisdictional Statement

The judgment of the Court of Appeals was entered on May 19, 1952 (R. 85). By order of the Supreme Court signed on August 1, 1952, Petitioner's time within which to file its Petition for Writ of Certiorari was extended until September 16, 1952 (R. 85). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Statute Involved

Section 401(h) of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, as amended, 49 U.S.C. 481(h)), is the principal statutory provision involved herein. This and other stautory provisions pertinent to this case are set forth in Appendix B, **infra.**

That part of Section 401(h) of the Civil Aeronautics Act around which the dispute mainly centers reads as follows:

> "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may **alter, amend, modify** or **suspend** any such certificate, **in whole or in part,** if the **public convenience and necessity so require, or** may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition or limitation of such certificate * * * ."[1]

[1]Emphasis in quoted material is added throughout unless otherwise noted.

Questions Involved

1. Did the Civil Aeronautics Board's order E-6040 (R. 6, 26 and 72) which directed that Western's "authority to serve El Centro, Calif., and Yuma, Ariz., shall be **suspended** up to and including December 31, 1952, or until the Board shall have finally determined a timely filed application by Bonanza Air Lines, Inc., for renewal of segment No. 2 of route No. 105 (including Yuma and El Centro) whichever shall last occur," constitute a **revocation** of any part of Western's certificate, within the meaning of Section 401(h) of the Civil Aeronautics Act, or was it a **suspension** within the meaning of that provision?

2. Does the Civil Aeronautics Board have the statutory power to **suspend** any part of the certificate of an air carrier when that certificate has been granted to that air carrier under and subject to the terms, conditions and limitations of the Civil Aeronautics Act for an indefinite period of time?

3. If the Civil Aeronautics Board has the suspension power described in Question No. 2 above, did the Board in this case lawfully exercise that power when, after notice and hearing, and upon a finding that the public convenience and necessity required such action, it suspended Western at Yuma and El Centro?

4. Is Western Air Lines, contrary to Section 1006(e)[2] of the Civil Aeronautics Act, entitled on appeal to raise a due process issue regarding just compensation when it

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2"1006(e) (49 U.S.C. 646) the findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

could reasonably have raised such issue before the Civil Aeronautics Board during the proceeding or upon petition for reconsideration and failed to do so?

5. If Western's failure to raise the due process issue before the Board, as stated above, is nevertheless sufficiently excusable to give this Court jurisdiction of the issue, did the Board's action suspending Western at Yuma and El Centro without compensation constitute the taking of Western's property without due process of law, in violation of the Fifth Amendment to the Constitution?

6. Do the foregoing present questions of such import as to require a determination by the Supreme Court of the United States?

Statement of The Case

In essence, the Civil Aeronautics Board's Order here under review (E-6040, dated January 17, 1952; R. 6), did several things:

1. It denied Southwest Airways' amended application for an extension of its route from Los Angeles to Phoenix via San Diego, El Centro, Yuma and various other intermediate points.

2. It denied Petitioner, Western Air Lines, then possessing, **inter alia,** a Los Angeles-San Diego-El Centro-Yuma route, an extension from **Yuma to Phoenix.** This was the **fourth** time that the Board had found that the extension of Western from Yuma to Phoenix was not in accord with the public convenience and necessity.

3. It suspended for a limited period of time Western's authority to serve **El Centro** and **Yuma.** This, in effect, suspended a **154** mile segment of Western's route, a seg-

ment lying approximately in the **middle** of the nearly **500** route mile extension granted to Bonanza Air Lines in this proceeding.

4. It suspended the authority of Frontier Air Lines (successor to Arizona Airways) to serve a Phoenix-Ajo-Yuma route.

5. It granted to Intervenor, Bonanza Air Lines, a route extension from Phoenix to Long Beach and Los Angeles, via Ajo, Blythe, **Yuma, El Centro, San Diego,** Oceanside and Santa Ana-Laguna Beach.

The area problem at which the Order here under review was directed had in one form or another been under consideration by the Board for nearly ten years.

Western's authority to serve El Centro was granted by the Board in 1943.[3] In 1946 the Board granted Western authority to serve Yuma.[4]

Arizona Airways, Inc., in February, 1948, was, among other things, authorized to provide service between Phoenix and Yuma, via Ajo.[5]

Western thereafter entered into an agreement with Arizona Airways whereby Western would transfer its Yuma-El Centro-San Diego route to Arizona, and in July 1948, filed an application with the Board for approval of such agreement.[6]

Western then filed with the Board on March 16, 1949, an application to suspend its authority to serve Yuma and El Centro, i.e., to suspend its Yuma-El Centro-San Diego

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[3]T.W.A. et al., North-South California Case, 4 C.A.B. 254.
[4]Rocky Mountain States Service Case, 6 C.A.B. 695.
[5]Arizona-New Mexico Case, 9 C.A.B. 85.
[6]Western-Arizona Agreement case, Dkt. No. 3440.

segment. Western sought this suspension on the express ground that its service over that route was uneconomical (C.A.B. Dkt. No. 3768).

On June 15, 1949, the Board issued its opinion in the original **Additional California-Nevada Service** case.[7] In that case there was in issue the question of a route from Los Angeles to San Diego and a route from Los Angeles to Phoenix, via a routing north of the route granted in the instant case. The Board deferred decision on that question for further consideration with the **Western-Arizona Agreement case, supra,** or until such time as the Board might determine final action thereon to be appropriate.

Within a short time thereafter it became apparent that Arizona Airways could not get its own routes activated and that Arizona would be unable to go through with its agreement with Western to purchase the latter's San Diego-El Centro-Yuma route.

Western then withdrew its application for Board approval of the Western-Arizona transfer agreement and also withdrew its application for suspension of its San Diego-El Centro-Yuma route authority. Not only did Western withdraw its suspension application but it again filed an application for extension of its San Diego-El Centro-Yuma route to Phoenix.

Subsequently on December 19, 1949, and without further hearing, the Board issued a Supplemental Order in the **Additional California-Nevada Service** case (E-3727) awarding a route to Southwest Airways between Los Angeles and Phoenix by substantially the same intermediate points here

[7] 10 C.A.B. 405.

in question, though the route granted was not the same route for which Southwest had applied (R. 15, footnote 6). Moreover, it granted the Western application for suspension at Yuma and El Centro, which application Western had prior to that time asked to be withdrawn. It further directed Western to show cause why its service at El Centro and Yuma should not be suspended for as long as Southwest held authority to serve those points.

The award to Southwest, however, carried an effective date some several weeks into the future, and an express reservation by the Board of freedom to postpone it from time to time as may be deemed necessary. It was twice postponed while petitions for reconsideration, re-hearing and re-argument were being filed and considered. Ultimately, after considering various challenges to the validity of the order awarding the route to Southwest, those challenges being advanced primarily by Western, the Board on March 10, 1950, rescinded its Order awarding the route to Southwest and its Order suspending Western at Yuma and El Centro.

Its March 10 order (E-3975) set forth the Board's belief that the entire question of the need for local service between Los Angeles, San Diego and Phoenix could best be determined by contemporaneous consideration with the question of Western's application for extension from Yuma to Phoenix, the question of the need for Western's suspension at Yuma, El Centro, Palm Springs and San Bernardino, and the question of the need for the suspension of Arizona (later Frontier) at Yuma and Ajo.

The **Additional California-Nevada Service** case[8], insofar as it concerned Southwest's application for a Los Angeles-San Diego route, and for a Los Angeles-Phoenix route was then re-opened for further hearing,[9] and Southwest was granted leave to amend its application so as to request also a route from San Diego to El Centro (so that its application would conform substantially to the route which the Board had earlier awarded to Southwest). The suspension dockets of Western and Arizona were consolidated therewith, as was Bonanza's application for a Los Angeles-San Diego-Phoenix route (via various intermediate points — a route substantially the same as that ultimately awarded to Bonanza). The case was then designated the **Re-Opened Additional California-Nevada Service** case.

Thus, in a situation that had become highly complex and fraught with innumerable legal and economic difficulties, the Board determined to make a fresh start and obtain a comprehensive, sound and equitable decision at the earliest possible date. It can fairly be said that as administrative proceedings of this type go, involving as they do complex economic and policy considerations, the **Re-Opened Additional California-Nevada Service** case was processed expeditiously, beginning in May, 1950. Hearing on the case was completed in January 1951, and the Board's order here under review was rendered in January 1952, some 12 months later.

It should be noted in connection with Western's service to Yuma and El Centro that from early in 1947 until Janu-

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[8]Dkt. No. 2019 et al.; E-3727, dated December 19, 1949.
[9]E-3975, dated March 10, 1950.

ary 1950, shortly after the Board first proposed to suspend Western at those points, Western provided Yuma and El Centro with only **three** round-trips **weekly.** Moreover, Western admitted at the re-opened hearing in this case that it was only **after** and **because** of the Board's move to suspend Western at these points that Western increased its service there from **three** round-trips **weekly,** to two round-trips **daily** — for the express purpose of resisting the Board's suspension proposal. Its **thrice-weekly** service at Yuma and El Centro was therefore the pattern for about three years (R. 22, 61-64), although it had generated a substantial number of passengers at El Centro in 1946 when it inaugurated service and provided two round-trips daily.

The Board, after notice and hearing, ordered Western **suspended** for a **limited period of time** at Yuma and El Centro. The suspension in this instance is for a considerably shorter period of time than is customary. It runs until December 31, 1952, the expiration date of Bonanza's own original certificate, or until final determination of Bonanza's own certificate renewal application if timely filed, whichever date should be the later. As to the question of suspension there is no question of notice and hearing in issue. No constitutional question of due process was raised before the Board, and Western did not file a petition for reconsideration.

The Board order in question was issued January 17, 1952, and on January 25, 1952, Western filed in the Ninth Circuit Court of Appeals a Petition for Review. It further sought and obtained from that Court a stay of the Board's order, pending judicial review. In view of the public in-

terest factors and the various other considerations involved, the Ninth Circuit gave the case an extraordinary priority, and made every effort to limit the proceeding to the essential problems involved. With full consent of the parties the matter was greatly expedited and on May 19, 1952, that Court entered its unanimous opinion and judgment upholding the Board's action and order in every respect. The stay order was dissolved on June 18, 1952, and on July 15, 1952, Bonanza inaugurated service over the entire new route. On July 18, 1952, Western suspended its operations at Yuma and El Centro. On September 16, 1952, Western filed in the Supreme Court its Petition for Writ of Certiorari.

Summary Of Argument

1. The Board's order directing the suspension of Western at Yuma and El Centro clearly constitutes a **suspension**, not a revocation, within the meaning of Section 401(h) of the Civil Aeronautics Act and any construction to the contrary must be based on the purest speculation in direct contravention of the very nature, purpose and language of the order.

2. The Board has the express and unequivocal statutory authority, upon stated conditions, to suspend the whole or any part of the certificate of any air carrier. Such power is specifically spelled out in Section 401(h) of the Civil Aeronautics Act, and is consistent with, and in furtherance of the promotional, remedial and developmental purposes of that Act.

3. The Board lawfully exercised its suspension power in this proceeding when, pursuant to the terms of Section

401(h) of the Act, acting upon its own initiative, upon notice and hearing, and upon findings that the public convenience and necessity required such action, it ordered the suspension of Western at Yuma and El Centro. It is an uncontroverted fact that the Board's self-initiated action was taken after notice and hearing and upon findings that its suspension action was required by the public convenience and necessity.

4. Western is not entitled on appeal to raise the due process issue and thereby confer jurisdiction of that issue on the Court when such an issue is excluded by Section 1006(e) of the Civil Aeronautics Act in view of Western's inexcusable failure to raise that issue in the proceeding before the Board or upon a petition for reconsideration.

5. In the event that the Court should nevertheless determine that the issue of due process is properly before it, the order suspending Western at Yuma and El Centro did not constitute the taking of Western's property without due process of law, as the authority originally granted to Western to serve Yuma and El Centro was granted subject to other terms of the Act and to the Board's reserved and ultimate right subsequently to suspend that authority in the interests of the public convenience and necessity; moreover, Western made no showing that it would suffer any property or financial loss by suspension at Yuma and El Centro.

6. Western has failed to demonstrate that, by virtue of the standards set up in paragraph 5 of Rule 38 of the Supreme Court, or otherwise, a writ of certiorari should issue to the Court below.

ARGUMENT

1. The Board's Order directing the suspension of Western at Yuma and El Centro clearly constitutes a suspension, not a revocation, within the meaning of Section 401(h) of the Civil Aeronautics Act, and any construction to the contrary must be based on the purest speculation in direct contravention of the very nature, purpose and language of the order.

Western contends that the Board's suspension order is tantamount to **revocation**, and that since a certificate may be **revoked only** for intentional and continued violation of the law, under the terms of Section 401 (h), the action taken by the Board in this case is invalid.

Such a contention clearly flies in the face of the express language and intent of the order, and wholly ignores the unequivocal statutory distinction between suspension and revocation. Moreover, it seeks to expand the scope of the issues in this proceeding far beyond what they actually are, and to shift the focus of the Court's attention to legal issues not now before the Court, in anticipation of events which **may** or **may not** ever materialize. It is essential that the Court know what this case is **not!** It is **not** a revocation proceeding; it is **not** an alternation, amendment or modification proceeding; it is **not** a permanent suspension. None of those actions has been taken, thus neither the legal basis for, not the propiety of, any such action is before the Court.

In their ordinary and most acceptable definitions, the terms of Section 401(h) of the Act may be classified into two types of authorization. On the one hand, the intro-

ductory sentence to 401(h) which gives the Board the power, **on its own initiative to alter, amend, modify** or **suspend** a certificate, in whole or in part, if the public convenience and necessity so require, grants to the Board an **economic** power and control to be employed **according to the requirements of the public interest.** The second part of that provision authorizes the Board to **revoke** a certificate, in whole or in part, for intentional and continued failure to obey the law; that provision is wholly unlike the first, and is clearly **punative.** Its intent and purpose is penal in nature and is in no way a limitation on the Board's **economic** control power to alter, amend modify or suspend in the public interest; the intent of the second part clearly is to deter violation of the law. One is clearly a **constructive** measure; the other a **destructive** measure. This has been the Board's interpretation of the Act from the very beginning, and it is the only defensible interpretation that may be given the two provisions.[10]

Petitioner concedes that the word "suspension" implies something temporary, i.e., not permanent. His argument is simply that the Board suspension Order is not in fact a suspension but a revocation.

The argument **assumes** that the Board will, **in the future,** take other actions that will demonstrate that the present intent was one of revocation, or that will, together with the present action, **then** constitute a revocation.

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[10]See, Caribbean Area Case, 9 C.A.B. 534, 545-554, All American Airways, Inc., Suspension Case, 10 C.A.B. 24, 27-28; Frontier Renewal Case, Docket No. 4340, Order Ser. No. E-5702, Sept. 14, 1951; Wisconsin Renewal Case, Docket No. 4387, Order Ser. No. E-5951, Dec. 13, 1951, North Central Route Investigation, Docket No. 4603 et al., Order Ser. No. E-5952, Dec. 13, 1951.

The U. S. Ninth Circuit Court of Appeals faced that issue squarely. The Court pointed out in a unanimous opinion that the Board's suspension order was for a limited period of time. It further pointed out that at the end of that limited period of time any number of different possibilities for action might face the Board, and that to argue now that the suspension order is in substance a permanent revocation is "the merest speculation" (R. 82-83). Argument substantially the same as Western's was presented to the U. S. Seventh Circuit Court of Appeals by United Air Lines, Inc.[11] in a case almost identical to the one here under consideration and was similarly rejected.

In any event the suspension order is, on its face and by its own terms, temporary in nature.

The clear purpose and intent of the suspension order is to experiment for a limited period of time with another and different type of air service by a different type of air carrier so that at the conclusion of that short-term period the Board will be in a substantially better position to determine the more long-range requirements of the public convenience and necessity in that area. The Board desires, and it is entitled to possess, more complete factual data and operating experience prior to a more long-range determination of what action in that area will best enable it to fulfill its promotional, developmental, and remedial functions under the Civil Aeronautics Act.

That that is the clear and proper scope and purpose of

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[11]United Air Lines v. Civil Aeronautics Board, Case Nos. 10544 and 10567, decided July 8, 1952. This opinion is set forth in Appendix B of Western's pending Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

the suspension order cannot be seriously questioned. **If and when** the Board takes some other action in the future that could, under the facts and circumstances then existing, constitute a revocation in violation of the requirements of Section 401(h), Western will of course be fully entitled to challenge its validity before the Courts. But Western cannot now properly attack as invalid that which does not exist, merely because it chooses to believe or to argue that ultimately such a situation **will** exist. Petitioner has not yet been hurt in that respect, consequently the cause of which it complains is entirely mythical and therefore not a proper subject for judicial determination.

2. The Board has the express and unequivocal statutory authority, upon stated conditions, to suspend the whole or any part of the certificate of any air carrier. Such power is specifically spelled out in Section 401(h) of the Civil Aeronautics Act, and is consistent with, and in furtherance of, the promotional, remedial and developmental purposes and provisions of the Act.

a. General Scope and Purpose of Board's Powers

Western's challenge of the Civil Aeronautics Board's suspension power has inherent in it a construction of the statutory authority of the C. A. B. Under the provisions of Title IV of the Civil Aeronautics Act of 1938 (52 Stat. 973 (1938), as amended, 49 U. S. C. 481 **et seq.** (1946), no air carrier may engage in air transportation unless there is in force a certificate of public convenience and necessity issued by the C. A. B. authorizing such service (Section 401 (a) of the Civil Aeronautics Act). Certificates may be is-

sued upon application after notice and hearing if the carrier is fit, willing and able to perform the service, and if the public convenience and necessity (the elements of which are set forth in Section 2 of the Act) require the service (Section 401(b) and (d).

Each such certificate shall be effective from the date specified therein, if issued for an **unlimited** period, and shall continue to be effective **until** "suspended or revoked" by the Board, or if issued for a **temporary** period, until the expiration date, unless sooner "suspended or revoked" (Section 401(g)). Each certificate must specify the terminal points and intermediate points which the air carrier is authorized to serve, and specify the nature of the service that is to be rendered thereunder (Section 401(f)).

Section 401(h) of the Act provides that the Board acting upon petition or complaint "or **upon its own initiative,** after notice and hearing, **may alter, amend, modify, or suspend** any such certificate, in whole or in part, **if the public convenience and necessity so require,** or **may revoke** any such certificate, in whole or in part, for intentional failure to comply with any provision (of the law)." Certificates may not be transferred (Section 401(i)) nor abandoned (Section 401(k)) without prior approval of the Board upon a finding that the public interest requires transfer or abandonment.

No merger, consolidation or acquisition of control may be achieved without prior Board approval (Section 408), and under Section 409(a) interlocking relationships are outlawed unless approved by the Board upon a finding that such acts are not inconsistent with the public interest or

adverse thereto. By virtue of Section 412, inter-carrier agreements must be disapproved by the Board if they are adverse to the public interest, and Section 411 permits the Board to order a carrier to cease and desist from unfair methods of competition.

Certificates conferred by the Board give the carrier no **proprietary, property interest** or any **exclusive right** to use any air space (Section 401(j)). Moreover, in the exercise of its functions under Title IV of the Act, the Board is authorized to establish from time to time such just and reasonable classifications of carriers or groups of carriers "as the nature of the services performed shall require". (Section 416(a)).

In addition to its basic licensing functions under the Act, the Board is given authority over rates and charges to require that they be just and reasonable, and not unduly discriminatory (Section 403 **et seq.**).

Those, then, are the basic statutory tools with which the Board was endowed to achieve the high purpose of the Congress. They are the economic **means** by which the Board through regulatory control was enabled to achieve the public interest end in the development of an economically sound air transportation system. But, as in any means to an end, it is essential that the end be recognized and understood in order that action taken to achieve that end may have meaning in its proper perspective.

In order to determine what the **end** envisioned by the Act was, it is not necessary to speculate in a vacuum or to struggle with vague, ethereal concepts extracted from a fusion of the legislative history and the proponent's imag-

ination. The framers of the Act spelled out in very precise terms what the end was to be — what was the **raison d'etre** for the regulatory powers given the newly created Board. Their purpose and their end is set forth in Section 2 of the Act which is entitled "Declaration of Policy" and it is from that section that we are able to glean purpose and meaning for the **tools** granted to the Board. Now just what was this C. A. B. created to do? Section 2 states that the **public convenience and necessity** for whose interest and protection the Act was adopted **shall be deemed to include,** among other things, the following:

(a) The **encouragement and development** of an air transportation **system** properly adapted to the **present and future needs** of the . . . commerce of the United States, of the Postal Service, and of national defense;

(b) The **regulation** of air transportation in such manner as to **recognize and preserve the inherent advantages of,** assure the highese degree of safety in, and **foster sound economic conditions in,** such air transportation, and to improve relations between, and **coordinate transportation** by, air carriers;

(c) To **promote adequate, economical** and **efficient service** by air carriers.

(d) To permit competition **"to the extent necessary"** to assure the **sound development** of an air transportation **system** properly **adapted** to the nation's commercial, postal and defense needs;

(e) The regulation of air commerce in such manner as to best **promote** its development.

It is patently clear that such worthwhile objectives could not be achieved by maintaining the **status quo** at any given point or any given time, recognizing that the Board was charged with the duty to "develop", "promote", "protect" and, in juxtaposition, to "**regulate**" in order to develop, promote and protect. It was charged with the duty to **regulate** for the purpose of **preserving the inherent advantages** of air transportation, just as other regulatory bodies have been charged with the duty of recognizing the inherent advantages of highway and/or rail service. (See **e.g.**, National Transportation Policy announced in the 1940 Amendments to the Interstate Commerce Act, 54 Stat. 899, amending 49 Stat. 543, 49 U. S. C. 301 (1946)). It was charged with the duty to **regulate** to **develop** and **foster** a **system** that was **economically sound**, and responsive to **the present and future needs** of the nation's commerce, postal service and defense. It was charged with the duty to **regulate** to assure that the service was **efficient** and **adequate**, and to insure its **development** and **coordination**.

Judicial recognition of this power to regulate to achieve the ends set forth in the Declaration of Policy is expressed in **American Airlines v. C. A. B.**, 192 F. (2d) 417 (C. A. D. C. 1951). That Court in discussing the propriety of a reliance on policy determinations under Section 2 of the Act said:

> "In the first place, Congress expressly directed that the Board consider, as being in the public interest and in accordance with the public convenience and

necessity, the development, encouragement and promotion of air transportation . . . Whatever belittling significance may be attached to the fact that those provisions were under a title 'Declaration of Policy,' they are in the statute, are **peremptory,** and are as much an enactment by the Congress as is any other section of the statute. * * * In the second place, the regulatory function, certainly insofar as it includes permissive certificates, is a **forward-looking function,** as any examination of regulatory measures easily demonstrates. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure to observe that distinction."

In the light of those conditions, it cannot be supposed that the Board was set up merely to function in the capacity of licensor, and having exercised that function, to become sterile. On the contrary, when the framers of the Act had agreed upon the end to be achieved, they set about to arm the newly created authority with the **tools,** the **means** to achieve that end, and they did so in no uncertain terms.[12] But they were not unjust in their demands; they gave as well as took, and the balance they agreed upon was struck in a revolutionary statute, one unparalleled in the history of public utility regulation in this country. An appreciation and an understanding of how that balance was struck is essential to an intelligent determination of the problem posed in this case.

There is no need here to recount the economic conditions

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[12]See Civil Aeronautics Board v. State Airlines, 338 U. S. 572 (1950), where, irrespective of differences of opinion as to the particular situation involved, full recognition is given to the ultimate public convenience and necessity objectives and instruments of accomplishment under the Civil Aeronautics Act.

that existed in air transportation before the adoption of the Civil Aeronautics Act. In that sense, the past is prologue, but the fact remains that conditions were so chaotic that the industry itself begged for help and protection. The Civil Aeronautics Board was the result of hard felt necessity for federal aid and federal protection to a young and promising industry. It was no depression panacea conjured up in confusion and imposed upon an unwilling but helpless group. The Civil Aeronautics Act was the product of a cooperative movement between government and industry in the mutual recognition that the business was peculiarly one affected with the public interest, and one that ought to be assured against the chaos and disaster of cut-throat or excessive competition, inadequate, uneconomical, inappropriate or inefficient service, and inadequate or inefficient financing.[13] The result of this cooperative movement was the adoption of the Act which in return for the bounty and protection given, required the industry to continue to cooperate toward the achievement of the goals set. But recognizing that future generations might reject any notion of being governed from the grave, the Act was drafted to give the Board the authority to direct and to force, if necessary, continued cooperation to achieve the ends set forth in the Act, and even that authority was not demanded without necessity nor required without concession.

As we have seen, Title IV of the Act gives the Board the necessary tools to carry out the declaration of policy of the

[13]See Appendix A, infra, for a review of the background of air transportation and the legislative history of the Civil Aeronautics Act.

Act. That is the regulatory side of the coin, the teeth, as it were, to assure that the purposes of the Act would not be frustrated by recalcitrant benefactors. But the other side of the coin represents what the government gave, in exchange, for the authority to regulate **in futuro.**

Title IV of the Act, in addition to its regulatory features, contains provisions of bounty rarely, if ever, found in public utility law. Under those provisions by which carriers serve among other things the postal needs of the country, they are entitled to receive "reasonable compensation" for such service (Section 401(m)). And in determining what shall be reasonable compensation for such mail service, the Act sets up entirely new and unprecedented standards. The carrier is not merely paid the **reasonable cost** of transporting the mail, but is paid under the standards established in Section 406(b) of the Act, the significant ones for our purposes being that in fixing and determining the fair and reasonable rate of a compensation, the Board may fix different rates for different carriers and different classes of carriers; and in determining the rate in such case the Board must take into consideration, **inter alia, "the need** of each carrier for compensation . . . sufficient to insure the performance of such service, and, together with all other revenues of the air carrier, to enable such carrier under honest, economical, and efficient management, to maintain and continue **the development of air transportation to the extent and of the character and quality required for the commerce . . . , the Postal Service, and the national defense."** By that provision, and for the sole purpose of building an air transportation system which

would most fully serve the requirements of the public convenience and necessity, the government undertook one of the most gigantic underwriting programs in history to that date. It issued to the carriers, subject to the terms, conditions and limitations of the Act, a federal life insurance policy, the annual cost of which has been as high as 112 million dollars or more, at least 40 to 60 percent of which is said to be sheer subsidy. (See, **e.g.**, Johnson, Sen. Edwin C., **Proposed Senate Action on Air Mail Subsidies**, 17 J. Air L. & Com. 253 (1950)). In other words, **in exchange for the power which it reserved to direct and control their present and future, the government guaranteed their survival against any and all economic vicissitudes not resulting from dishonest, uneconomical or inefficient management.**

That it was neither the intent of the Act nor the purpose of the Board to underwrite and thereafter perpetuate air service that is not **wholly responsive** to the public convenience and necessity as defined in Section 2 of the Act is too obvious to argue. The Board recognizes that fact and the industry as a whole recognizes it. President Eddie Rickenbacker of Eastern Airlines underscored the industry acceptance of the notion that in order to be justified the service must be required by the public convenience and necessity and operated in accordance with sound economies. "A tragic error which has been committed . . . has been the assumption that . . . the mail pay section — of the act ha(s) set air transportation apart . . . ha(s) made it immune to the grim necessities of sound business practices and ha(s) promised it a blank check and ha(s) guaranteed

each air carrier a livelihood at the expense of the taxpayers," (**Airline Industry Investigation,** Hearings pursuant to S. Res. 50 before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Cong., 1st and 2d Sess. (April 11, 1949-Jan. 31, 1950) at p. 1112).

The plain facts are that the Board in determining what services are required by the public convenience and necessity as defined by Section 2 of the Act has a very clear duty under the Act to protect the United States Treasury from undue and unnecessary burdens and to insure that the monies spent out of that Treasury **produce the maximum public benefit.** In discharging that duty, the Board has the authority under the Act to certificate service and to continue such service under a certificate **only so long** as the public convenience and necessity require it. It would be violative of the Board's duty under the act to permit or continue a service that was either unjustifiably uneconomic or not fully responsive to the public need, or which did not preserve the inherent advantages of air transportation and contribute to its development, its soundness, its adequacy and efficiency.

The Board, in the exercise of its powers under Title IV, is required to supervise on a **continuing basis** the services that are performed to insure that they are responsive to the requirements of the public interest. When facts are presented to the Board which show, under the public convenience and necessity tests set forth in Section 2, that the service of a carrier is no longer required or that a different type of service is required, or that other changes will produce a service more fully responsive to **public inter-**

est requirements and objectives of the Act, it is the Board's statutory duty to make the maximum use of its prescribed powers to effect such changes as are necessary to suit the requirements as they are then shown to exist. Section 401 (h) of the Act is plainly intended to provide the Board with authority to take just such action.

Were it otherwise, this would be an anomalous purse without purse-strings. It would be a veritable Frankenstein which when once created would itself sit in final judgment on the needs, in fact the very life, of its creator, the public interest. Congress, the Board and the industry itself have grave public responsibilities under this Act. Unless we are to abandon all concepts of public morality, not to mention all concepts of legality, the right of the Board to take the action here complained of must be upheld.

The basic balance between what the government gave and what it demanded is thus reflected in the Act's various provisions. Section 401(h) merely insures that the balance will be maintained. Under the previous regulatory acts where the subsidy provisions were not present, it was safe to assume that whenever an amendment or an alteration was necessary in the basic certificate for economic reasons, that is, necessary because of a change in the requirements of the public convenience and necessity which was reflected unfavorably in the carrier's earnings or financial position, that the carrier would itself apply to the regulatory agency for the necessary relief. Under those conditions, statutes which permit alteration, modification or suspension of a certificate "upon the application of the holder," as the

Motor Carrier Act does for example, were generally considered adequate to protect both the carrier on the one hand and the public interest on the other. The carrier was protected by virtue of this right to make application for a change in his certificate, which he would unquestionably do if the conditions made the service in question economically unjustifiable, and the public interest was largely regarded as protected by the authority of the Commission to grant or deny the relief requested.

But the instinctive motivating factors which move the carrier to act on its own motion in the absence of subsidy provisions to fall back on are not present once a protective subsidy provision comes into play. Then by virtue of the guarantee against losses, the carrier has little or no incentive to correct uneconomic conditions under the certificate; he is for all practical purposes **insured** against loss, so the public interest plays little if any part in the carrier's own route-program consideration. Size and resulting power seem to become the driving motives and end objectives.

Under those circumstances, unless the regulatory authority is empowered to act on its own initiative **to correct** or **prevent** uneconomic conditions or to **correct** or **prevent** inadequacies or inefficiencies in service under the certificate, then the cost to the government is beyond practical control, and the existing requirements of the public convenience and necessity are wholly ignored. It was to avoid or to cure just such a situation that Section 401(h) was put into the Civil Aeronautics Act and it was because such a situation was unlikely to arise without the existence of the subsidy provision that no similar authority is found in other federal

regulatory Acts.

It is no answer to claim as Petitioner does that it no longer requires government subsidy and that it therefore should in effect be free of government supervision and direction. In the first place, it is highly questionable whether Petitioner is in fact now operating without direct government subsidy. In the second place, it is an indisputable fact that Petitioner is and will be for many years to come the beneficiary of millions of dollars in federal funds spent on airways, airports and numerous other direct and indirect services and facilities. Thirdly, as Petitioner well knows, if tomorrow should bring a sudden shift in the now rising economic current in which the nation is moving, as it well may do, Petitioner would be one of the first to fall back again on the subsidy guarantee provisions of the Act and under them would be entitled to be made whole from the date on which its mail rate adjustment petition was **filed** with the Board.

Lastly, it will be readily apparent to the Court that even if Petitioner has at last in fact, and at least for the moment, obtained a **so-called** self-sufficient status, Petitioner was literally carried to that highly desirable status on the largess and bounty of the American people. For at least fourteen years, and more likely twenty, Petitioner's survival and growth have been almost wholly dependent upon direct mail pay subsidies provided by the American taxpayer. No one can deny that without those subsidies Petitioner would be non-existent today.

The obvious fact that obviously is not apparent to Petitioner is that those subsidies were provided for the in-

terim and ultimate benefit of the **public interest.** Petitioned has been nourished, fattened and sustained by the largess of the U. S. public through many years, each of which would otherwise have been a year of economic annihilation for Petitioner, for the sole purpose of maintaining Petitioner in the position where it could best serve the **public need**, whatever that need may be from time to time. The public need, not the carrier's selfish interest, has been, is, and always will be, the controlling determination. That is the sole purpose for which Petitioner today exists whether Petitioner is today subsidized or not. And it is not up to Petitioner to determine what that public need may be from time to time. That function has been lodged exclusively in the hands of the Civil Aeronautics Board, together with the clearly defined instruments and power to give full force and effect to determinations made for the public benefit.

The public need, insofar as air transportation is concerned, has not yet crystallized into a fixed and inflexible pattern. In this stage of the development of an air transportation system, the requirements of the public convenience and necessity are still being sounded and measured. The Board has not only the power to maintain a continuing examination and study of the public need, but it has a direct obligation to do so. And it clearly has both the responsibility and power to see that the requirements of the public convenience and necessity, as determined by the Board, from time to time, receive maximum satisfaction from the air transportation system of this country. It is the Board's job to determine those requirements and to

mold and work and knead the air transport pattern into optimum conformity with such requirements.

Section 401(h) of the Act, authorizing the Board to take the initiative and, after notice and hearing, to alter, amend, modify or suspend any certificate, in whole or in part, if the public convenience and necessity so require, is an instrument of construction expressly designed for that purpose. It is an instrument without which the basic purposes and objectives of the Civil Aeronautics Act would be rendered a nullity.

Every air carrier accepts its certificate subject to the paramount interest of the public. It accepts it with full knowledge that its own private interests must be subservient to the needs of the public. It accepts an expressly limited, clearly qualified authority. Irrespective of whether or not it has laid claim to the subsidy benefits of the Act, the Federal Treasury stands behind it as a virtual guarantor of the carrier's survival. In return for this insurance policy and innumerable other protective benefits to which it is entitled under this developmental statute, the carrier assumes, among other things, the obligation to submit its services and its pattern to such adaptation as is required by the public convenience and necessity, as found by the Civil Aeronautics Board to exist. If the public interest is found to require a limited suspension of a carrier's services at certain points, then under the obligations which the carrier has assumed under this Act and under the limiting qualifications with which its certificate was granted and accepted by it, the carrier's private interests must yield to the overriding public interest.

That such a limited suspension can be undertaken under the provisions of Section 401(h) cannot really be seriously questioned. Petitioner itself has recognized the validity of the suspension provision of Section 401(h), at least insofar as that section authorizes the issuance of a suspension order upon **petition** of the carrier suspended. As previously indicated, Petitioner itself in 1949 petitioned the Board pursuant to Section 401(h) for a suspension of its service at the very points here involved, Yuma and El Centro. In the face of the clear and unambiguous language of Section 401 (h) it is impossible to conceive that any serious consideration can be given to an argument that 401(h) authorizes suspension, but **only** when such suspension is sought by the carrier. The provision regarding suspension plainly states that the Board may order it "upon petition or complaint or **upon its own initiative**".

Moreover, Petitioner has tacitly recognized the validity of suspension on the Board's own initiative, for Petitioner sought in this case an extension of its own route, from Yuma to Phoenix, with full knowledge of the fact that such a grant would necessitate the suspension of another carrier then certificated between those points. Petitioner's rationale on that point is simply that since the other carrier only had a **temporary** certificate the Board could suspend it. But the Act draws no such distinction. On the contrary, it specifically contemplates suspension of **both** temporary and unlimited type certificates (Section 401(g)).

The public interest may require suspension for any number of reasons. One of these may be the need for an experimental service of a different type performed by a

different type of carrier serving a different type of market. Another may be the need of strengthening the air route pattern by strengthening its constituent elements. These particular considerations were present in this case. The route in question was sufficiently strong to constitute a strengthening of Bonanza's then existing route pattern. On the other hand, that part of it which was possessed by Petitioner was weak compared to the rest of Petitioner's system and hence constituted a weakening element in Petitioner's overall route structure. The type of service required by the communities in question and the willingness and ability of the two carriers (Petitioner and Bonanza) to provide that service, considered against the backdrop of the nature, character and experience of each carrier, were also important and proper considerations in weighing the question of what would best serve the requirements of the public convenience and necessity.

Pursuant to the fulfillment of the objectives of the Civil Aeronautics Act, the Board is also expressly authorized to classify carriers from time to time in accordance with the nature of the service performed and the extent of that service (Section 416(a)), and is authorized in the establishment of rates of compensation under Section 406(b) to take account of such classifications in determining the rate that shall be applied. There can be no doubt that the "need" of the carrier may well reflect to a large extent the nature of his services and the extent to which they are operated, and facts which authorize classifications of carriers under Section 416(a) are apposite under 406(b) in determining rates of compensation for mail service. Thus if the Board

were to find that because of the nature of the service required, the public convenience and necessity required the service by a carrier of one class rather than by a carrier of another class, it would be perfectly justified in transferring the authority to operate the service to the carrier in the suitable class, even though the cost to the government is greater, and even though the first carrier is currently operating on a "self-sufficient" basis and the second is not. Cost is but one of the considerations entering into the questions of public convenience and necessity, and most if not all of the currently certificated carriers were, until enlarged and otherwise strengthened by various actions of the Civil Aeronautics Board, almost wholly dependent upon mail pay subsidies.

The test in every case is the public convenience and necessity as defined in the Declaration of Policy in Section 2 of the Act, and not the interest of a particular carrier. If it were otherwise, the development of an air transportation system properly adapted to our needs, present and future, would be seriously hampered or perhaps entirely blocked, contrary to the intent of the Act, and the ultimate result would be to transfer outright the public utility regulatory functions from the Board, where they were vested by Congress, to the carriers themselves, to be employed by them for their own private purposes and gain. That such a result was ever intended is inconceivable. It is clear therefore that whatever else may be said of the powers of the Civil Aeronautics Board, it was expressly given the authority to maintain currently the paramount public convenience and necessity according to the dictates of the public interest re-

quirements from time to time; and its actions in the discharge of that authority are to be governed by the express directions and limitations contained in the Act, on the one hand, and by the knowledge of and experience with the requirements of commerce, the Postal Service and the national defense on the other.

b. Board's Powers Under Section 401(h)

To recapitulate briefly, for present purposes, Section 401(h) of the Act provides that the Board, acting upon petition or complaint "or **upon its own initiative**, after notice and hearing, may **alter, amend, modify** or **suspend** any such certificate, in whole or in part, **if the public convenience and necessity so require**".

This case as presented by Western actually poses a narrow and simple legal question. It is this: Does this Board, upon finding that the public convenience and necessity so require, have the power to suspend a certificate of public convenience and necessity which has been previously granted to the carrier for an indefinite period? That is the real legal issue here; reasons for and against suspension should not be confused with the legal issue, as such reasons are matters that are weighed in the balance in determining the requirements of the public convenience and necssity. Once these are found to require suspension, we then have the purely legal question concerning the **power** of the Board to suspend, in whole or in part, for a limited period of time an indefinite or so-called permanent certificate authority.[14]

Though not necessary to the Court's decision on this

[14]The issues framed in the Court below were basically limited to that legal question (R.5).

case, since we hold that it is an undisputed fact that the Board made the necessary findings as to the requirements of the public convenience and necessity (see Section 3 of this brief, **infra**), it nevertheless seems desirable to point out to the Court some of the public convenience and necessity considerations entering into this case that it may better understand the nature and need of the power in question and the objectives for which it is employed by the Board. The public need in a particular area for another type service by another type carrier than presently afforded, when the area in question will not currently warrant service by two carriers, can unquestionably be a proper basis for a finding that the public convenience and necessity require the limited suspension of the carrier then serving only a part[15] of that area.

It is also obvious from the Board's opinion and order in this case that the Board's finding that the public convenience and necessity require suspension of Petitioner's services at Yuma and El Centro is based on a number of factors that enter into the Board's expert judgment as to the requirements of the public interest. Such factors include but are not limited to: (1) the fact that the **new** service to be authorized in the area was of a local-service nature (R. 10, 14, 18); (2) the Board's well-established policy that local service should be provided by so-called local service carriers specializing in and devoting all their attention to that type of service (R. 17); (3) the fact that

[15]There were in issue in the case route extensions from nearly 500 to 1,000 miles. Bonanza was awarded almost 500 new route miles. Western was suspended on a segment about 154 miles in length; that segment lies in about the middle of the nearly 500-mile extension granted to Bonanza.

the route found to be required by the public convenience and necessity involved a number of points other than the two suspension cities of Yuma and El Centro (R. 9-14, 17-18, 21, 27); (4) the fact that the Yuma and El Centro traffic is presently insufficient to justify service by two carriers (R. 16, 22); (5) the fact that Yuma and El Centro were found to require a local-type service which could best be provided by a local service carrier (R. 10, 14, 17, 18, 21, 22); (6) the fact that Western's history of operations at Yuma and El Centro showed a blatant disregard for Western's public interest obligations to those communities (R. 22, 61-64); (7) the fact that Western's history of operations at Yuma and El Centro reflected a marked lack of interest in the development of traffic at those communities (R. 22, 61-64); (8) the fact that Western's show of renewed interest in providing proper service to those communities stemmed from ulterior motives wholly unrelated to the needs of those communities and Western's obligation to meet those needs (R. 17, 22, 62-63); (9) the fact that Western had represented to the Board that it could not operate its San Diego-El Centro-Yuma segment on an economical basis unless it were granted an extension from Yuma to Phoenix (R. 64; C. A. B. Dkt. No. 3768); (10) the fact that suspension of Western at these two points is in furtherance of the Board's efforts to strengthen the financial and operating structure of the trunk-lines by removing some of the small intermediate points that are marginal in terms of profit, and thereby generally extending the average length of haul and average length of flight, thus enabling the trunk carriers to concentrate on the long-haul, high-density traffic — the kind

of traffic which their large, high-speed, high-altitude aircraft, are ideally suited to serve at a maximum economy and profit to the carrier (R. 15-18, 21-22); (11) the fact that the award to Bonanza will substantially improve that carrier's efficiency, economy and service (R. 19-21); and (12) the fact that the suspension of Western and the award to Bonanza will strengthen and improve the air transport pattern and service in the area in question (R. 10-14, 17-23).

The action here taken by the Board in ordering a temporary suspension of a certificate is, of any of its **authorized** powers, the furthest removed from revocation. The power to suspend is the lesser of the powers which the Board may exercise in the interest of the requirements of the public convenience and necessity. The Court of Appeals for the District of Columbia has given clear recognition to this power. It has said that under Section 401(h) the Board may suspend an entire certificate (**Pan-American-Grace Airways** v. **Civil Aeronautics Board**, 178 F. 2d 34, 36 (C. A. D. C., 1948). The Board may also **alter**, **amend** or **modify** a certificate. There is little likelihood that Petitioner could successfully challenge the exercise of those **broader** authorities which have inherent in them no such element of the temporary as does the term "suspension". The Board has properly considered suspension to connote a temporary action (See **Caribbean Area** case, **supra**), but alteration, amendment or modification have no such temporary limitation. Since the Act plainly authorizes those broader and more permanent powers, the restraint exercised by the Board in employing the lesser authority of suspension is certainly indicative of the non-permanent nature of the

action here taken.

The Board's power of suspension was clearly recognized by the President's Air Policy Commission and a more effective use of that power to enhance the careful development and planning of a sound national route pattern was strongly urged by the Commission. It urged a comprehensive survey by the Board and the development of a more cohesive policy, saying:

> "As part of such review, if the Board should find any routes no longer now required by public convenience and necessity, **it should use any present legal powers** such as **suspension** or reduction of 'need' payments **to reduce the effect of any errors in the present system.**" **Survival in the Air Age**, p. 111, January 1, 1948.

There is not the slightest ambiguity in the language of Section 401(h), but in order to demonstrate as conclusively as possible to the Court the utter impropriety of Petitioner's contention that the Board does not have the **power** to suspend any of Petitioner's services, reference may be made to prior case law under other Acts and the legislative history of the Civil Aeronautics Act, which clearly and unequivocally stand as a bulwark against Petitioner's construction of the Act.

In essence, Petitioner's contention is that the power of the Board to suspend a certificate in any respect or in any manner must be interpreted in accordance, **not** with the language of the Civil Aeronautics Act, but with the provisions of the Motor Carrier Act which provides that no certificate may be suspended or revoked except (1) upon application of the holder; or (2) for intentional and continued violation

of that Act (Part II of the Interstate Commerce Act, 49 Stat. 543, as amended, 54 Stat, 919, 49 U. S. C. 312 (1946)). But under that Act, the I. C. C. has no authority to take action "on its own initiative" as the C. A. B. has under Section 401(h) of the Civil Aeronautics Act; the I. C. C. has no authority to amend, alter, suspend or modify a certificate **except upon application from the holder.** In the absence of such an application, a certificate once issued is, with certain qualifications (see, **e.g., United States v. Rock Island Motor Transport Co.**, 340 U. S. 419 (1951); **United States** v. **Texas and Pacific Motor Transport Co.,** 340 U. S. 450 (1951)), inviolate except by revocation under the express terms of the statute.

Under the terms of the Water Carrier Act (Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. 901, **et seq.** (1946)), the I. C. C. has **no power whatsoever** to alter a certificate, and has **no power to revoke** a certificate on **any** ground so far as the statute reads. The United States Supreme Court expressly held that the I. C. C. could not **alter** a certificate granted under that Act **in the absence of** statutor authority **(United States** v. **Seatrain Lines,** 329 U. S. 424 (1947)). But there is nothing in the **Seatrain** case apposite here. There was **simply no stautory authority,** for either alteration or revocation of the water carrier certificate. The **Seatrain** case therefore stands for the proposition that the I. C. C. in the absence of **any** statutory authority, may not alter, amend, suspend or revoke the certificate of a water carrier under any circumstances known to date. But if we carry the development of the law on the subject one step further and examine the authority of the

I. C. C. to alter or amend a certificate of a Motor Carrier, it is clear that even with statutory authority which on its face would appear to exclude any but penal action by the I. C. C., **a declared policy of Congress to preserve the inherent advantages** of motor transportation, **plus a reservation clause in the certificate,** were held to give the I. C. C. the power to alter and amend a certificate **beyond** the express terms of the statute **(United States** v. **Rock Island Motor Transit Co., supra).** ..That case alone, exclusive of the authority contained in our Section 401(h), would be substantial authority for the Board's action here, both by reason of **the Congressional declaration of policy in Section 2 of the Civil Aeronautics Act and by reason of the Board's reservation clause contained in every certificate** which provides in essence that the privileges granted by the certificate "shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board". The **Rock Island** case required that the Supreme Court find authority in such a reservation clause to make **substantial** alterations in the authority granted, even though there was **no express statutory authority** for such alterations. But the Court is not now called upon to rest its decisions on a construction of general policy provisions and general reservations incorporated in certificates. The Civil Aeronautics Act of 1938 cured the shortcomings of the Motor Carrier Act of 1935 and **expressly** gave the Board the power to **amend, alter, modify** or **suspend** a certificate whenever the requirements of the **public convenience and necessity** show the need for such action. The "Achilles' heel" in these certificates

exists by virtue of the statute under which they were conferred and they must yield to the prevailing requirements of the public convenience and necessity.

Not even some public **advantage** in the certificate as it exists is sufficient to hold back the I. C. C.'s authority to alter a certificate if otherwise necessary. In **I. C. C.** v. **Parker,** upon which the Court relied in part in the **Rock Island** case, the Court said, "If the Commission later determines that the balance of public convenience and necessity **shifts** through competition or otherwise, so that injury to the public from impairment of the inherent advantages (of motor transportation) . . . exceeds the advantage to the public . . . the Commission may correct the tendency." (326 U. S. 60, 71-72).

How much more appropriate this language under the Civil Aeronautics Act of 1938 which **expressly** authorizes the Board to suspend, alter, amend or modify certificates when the public convenience and necessity so require, and under which numerous public interest objectives are spelled out in detail, including the preservation of the inherent advantages of air transportation. This is not a situation where "the law has spoke too softly to be heard" above the clamor of vested rights; its letter is clear, its intent manifest and its command compelling!

There is no authority whatsoever for the contention of the Petitioner that the Board is powerless to order this temporary suspension. The Civil Aeronautics Act of 1938 represents the most recent federal regulatory Act of its kind and is properly interpreted to embody many improvements over earlier statutes, under whose provisions regu-

latory shortcomings had become obvious by 1938. The experience of other regulatory bodies under statutes authorizing less flexible action was certainly in the mind of the framers as is shown later herein in the legislative history.[16] In addition to experience under the three Parts of the Interstate Commerce Act already discussed, other federal statutes show that Section 401(h) of the Civil Aeronautics Act was a grant of a new regulatory feature since it granted to the Board not only the usual **penal** provisions in suspension and revocation, but gave the Board an **economic** sanction to apply according to the dictates of the public convenience and necessity. Compare Section 4(e) of the Federal Alcohol Administration Act, 49 Stat. 978 (1935), 27 U. S. C. A. 204(e) (Supp. 1946), which permits suspension or revocation only for violation; Section 6 of the Federal Power Act provides for suspension upon the "mutual agreement" of the government and the holder, and for revocation for violations (41 Stat. 1067 (1935), 16 U. S. C. A. 799 (1946)). The Merchant Marine Act, 49 Stat. 1985 (1936), 46 U. S. C. A. 1101 (1946), contains no provisions analogous to Section 401(h). Most state laws provide for suspension for "good cause" and for revocation for intentional violation. See **e.g.** Ariz. Code Ann. Tit. 66, 511 (1939); Tenn. Code Ann. 5501.1 (Williams 1934); Utah Code Ann. c. 76, art. 5, ss 33 (1943); Ohio Code Ann. 614-87 (Page 1946).

c. Legislative History

Recourse to the legislative history is not actually required in this proceeding, since the language of the statute

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[16]Appendix A, infra.

is free from ambiguity and its purpose and intent defined in terms that do not conflict. But even if the Court should have some question with regard to the intent of the framers of the Act in enacting Section 401(h), reference to the legislative history shows conclusively that the action here taken by the Board was fully appreciated and intentionally authorized. For the convenience of those who are interested in the legislative history of the Civil Aeronautics Act, with particular reference to Section 401(h), a summary is attached hereto as Appendix A.

3. The Board lawfully exercised its suspension power in this proceeding when, pursuant to the terms of Section 401(h) of the Act, acting upon its own initiative, upon notice and hearing, and upon findings that the public convenience and necessity required such action, it ordered the suspension of Western at Yuma and El Centro. It is an uncontroverted fact that the Board's self-initiated action was taken after notice and hearing and upon findings that its suspension action was required by the public convenience and necessity.

Under Section 401(h) of the Act there are the following conditions which must underlie a suspension order:

1. The Board must act upon (a) a petition, or (b) a complaint, or (c) its own initiative.

2. The Board can act only after notice and hearing.

3. The Board must find that the public convenience and necessity require the suspension action (Section 2 of the Act defines and details the factors which the Board shall consider, among other things, as being

"in accordance with the public convenience and necessity").

These are the sole standards that must govern in determining whether or not the Board acted lawfully when it ordered Western's suspension at Yuma and El Centro. Weighing the Board's action then, in the light of those standards, the only conclusion that can be reached is that the Board exercised its suspension power in a lawful manner.

The Board itself **initiated** the suspension action. After due **notice** a full and complete **hearing** was held in Washington and, for the convenience of the parties, continued in Los Angeles. Western and other parties presented lengthy and detailed exhibits at the hearing, several witnesses befor the Examiner, briefs to the Examiner, briefs to the Board itself and had oral argument before the Board. The proceeding consumed nearly two years from start to finish. Western does not contend that there was lack of adequate notice or hearing.

The only remaining requirement then is that the Board must act upon a finding that the public convenience and necessity require suspension.

Western does not contend that the Board failed to make such a finding.[17] The issues in the Court below resolved themselves into the single legal issue of whether the Board had the **power** to take the actions it took for the reasons it took them (R. 5). Western in substance simply controverts the **power** of the Board to take the action that it took in the

[17]Nor does Western contend that the ultimate finding was unsupported by basic findings of fact or that the findings of fact were unsupported by substantial evidence.

interests of the public convenience and necessity. Western singles out **some** of the reasons and factors underlying the Board's actions, puts its own interpretation on their scope and effect and purpose, and simply contends that the meaning of the standard of public convenience and necessity will not embrace them. It is essentially then an argument then as to the meaning and scope of "public convenience and necessity"; or more accurately, merely another way of challenging the **power** of the Board. Western is thus seeking to have this Court arbitrarily spell out the outside limits of that term, without regard to the facts and circumstances which may prevail in **other** situations when the scope and applicability of the phrase are in question.

Its contention that suspension in the interests of the public convenience and necessity does not contemplate the action which the Board took in the instant case is not an attack on the lawful exercise of the power in question but is rather an attack on the scope[18] of the power itself.

The argument then that the Board has not lawfully exercised its power must fail, for as shown above all of the elements essential to establishing the lawful exercise of that power are present in the instant case.

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[18]The scope of the Board's suspension power is discussed at some length in Section 2 of this argument, supra. Western can only argue "abuse" of power by arguing that "public convenience and necessity" does not embrace the action here taken. That argument then calls into question the scope of the term, and hence returns us to the question of the scope of the Board's power.

4. Western is not entitled on appeal to raise the due process issue and thereby confer jurisdiction of that issue on the Court when such an issue is excluded by Section 1006(e) of the Civil Aeronautics Act in view of Western's inexcusable failure to raise that issue in the proceeding before the Board or upon a petition for reconsideration.

Section 1006(e) of the Civil Aeronautics Act, governing judicial review of the Board's orders, reads in part as follows:

> ". . . No objection to an order of the Board shall be considered by the Court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Western is barred by the foregoing from raising a Constitutional issue by reason of the fact that it did not raise the issue before the Board and it has presented no reasonable grounds for its failure to do so.

The following facts amply demonstrate that Petitioner is conclusively barred from raising the issue for judicial review:

a. Western did not raise the issue in the re-opened proceeding which led to the order here under review, although a proposed suspension of Western at Yuma and El Centro was one of the principal issues from the outset of that proceeding.

b. After the order was issued on January 17, 1952, directing the suspension of Western at Yuma and El Centro, Western did not raise the Constitutional issue by petition for reconsideration.

c. Western's excuse for failure to raise the issue before the Board is **first** set forth in its Reply Brief before the Ninth Circuit Court of Appeals where it con-

tended that its failure, if it was a failure, was due to Western's "Disinclination to prolong further a proceeding already prolonged beyond reason . . . " (p. 26). Its present Petition to the Supreme Court does not set forth a single reason for its failure to raise the issue before the Board, yet it obliquely leaps to the end conclusion that its failure was reasonable and that this Court should therefore consider the issue.

d. To have raised the issue during the course of the proceeding obviously would not have prolonged the proceeding as the issue is essentially a legal issue and would normally be raised when the issues are being formulated prior to hearing; it would thereafter rest largely on arguments in briefs. The contention that it would prolong the proceeding is obviously specious.

e. Petitions for reconsideration were promptly filed by some of the other parties to the proceeding and were in due course considered by the Board; hence Western's failure to raise the issue at that point for fear of delaying the proceeding is also a pure fiction. The Board provided for a delay in the effective date of its suspension order for the sole purpose of allowing time for the filing and entertainment of petitions for reconsideration, as is its custom and practice. The filing by Western would have caused no delay that was not otherwise involved.

f. The truth is that Western never gave any serious consideration to the question until it filed its original brief in the Ninth Circuit Court of Appeals. The Constitutional question was purely and simply an **afterthought** on which Western has attempted to capitalize; it has attempted to employ the argument to obscure the weakness of its basic contentions. So much of an afterthought was it that **Western did not even raise the Constitutional issue on its Petition for Review** filed in the Ninth Circuit Court of Appeals (R. 1-4).

For the foregoing reasons Western cannot overcome the

bar imposed by Section 1006(e) of the Civil Aeronautics Act and is conclusively foreclosed from raising the issue.[19]

5. In the event that the Court should nevertheless determine that the issue of due process is properly before it, the order suspending Western at Yuma and El Centro did not constitute the taking of Western's property without due process of law, as the authority originally granted to Western to serve Yuma and El Centro was granted subject to other terms of the Act and to the Board's reserved and ultimate right subsequently to suspend that authority in the interests of the public convenience and necessity; moreover. Western made no showing that it would suffer any property or financial loss by suspension at Yuma and El Centro.

In the first place the original grant of the authority to Western to serve Yuma and El Centro was subject to the limitations of the statute which authorized that grant. Section 401(j) of the Civil Aeronautics Act (49 U. S. C. 481(j)) provides:

> "No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air navigation facility."

Western's certificate was granted subject to this condition and accepted subject to this condition. It is clear from the statute that if Western accepts the certificate it accepts it with the understanding that it confers no property right. **A fortiori,** if the Board were subsequently to "take" it

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[19]See Marshall Field & Co. v. National Labor Relations Board, 318 U. S. 253, 256 (1943), and Aircraft and Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 (1947).

away from Western, that "taking" could not constitute the taking of property.

Further, Western's authority to serve Yuma and El Centro, among numerous other cities, was granted subject to the express statutory reservation that the Board could subsequently suspend, alter, modify or amend it, in whole or in part, if the public convenience and necessity so required (Section 401(h), 49 U. S. C. 481(h)). Western accepted the grant of authority subject to that express reservation of power in the Board. Thus the nature of Western's property interest, if it be assumed for the sake of argument that there was one, must be qualified and delineated by the terms and conditions of the statute that created that interest.[20] Here Western accepted an interest clearly subject to the Board's expressly reserved power later to suspend, alter, modify or amend it in the public interest. A lawful exercise of that reserved power cannot therefore be deemed unconstitutional. And the power is lawfully exercised when it is exercised in conformity with the requirements of the governing statute.

The **Report of the Federal Aviation Commission** (Sen. Doc. No. 15, 74th Cong., 1st Session (1935)) recommended that when certificates were granted they "should not be cancelled **except for good cause** without equitable compensation to the holder". The obvious intent of that recommendation was that if there was **good cause** no compensa-

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[20]United States v. Rock Island Motor Transit Co., 340 U. S. 419 (1951); see also Chicago, I. & L. Ry. Co., v. United States, 270 U. S. 287 (1926); American Bond & Mortgage Co. v. United States, 52 F. 2d 318 (C.A. 7, 1931) cert. denied 215 U. S. 538 (1932); Trinity Methodist Church South v. Federal Radio Commission, 62 F. 2d 850 (C.A.D.C., 1932); see also Perry v. United States, 294 U. S. 330, 350-351 (1935).

tion would be provided for. It also suggests that there could be situations where the certificate could be cancelled **without** any showing of good cause, but that the holder should be equitably compensated in such instances.

It is apparent that Congress focused its attention on that question for in the Civil Aeronautics Act it refused to go as far as the Aviation Commission had recommended. In the first place it provided for several less drastic actions than cancellation and provided that there must be a finding of good cause (public convenience and necessity) for each of them. And for outright cancellation of the certificate it set up a different standard. Having adopted the requirement that good cause be established as a basis for the less drastic actions, Congress obviouly felt there was no need then to include the provision for equitable compensation, for **no action** was to be taken without a showing of good cause.

Moreover, with reference to Petitioner's claim that it should be compensated for its pioneering efforts, its leaseholds and its ground equipment related to the two stations in question, there are several facts which the Court should have in mind.

a. Western's developmental expenses and operational losses at Yuma and El Centro were underwritten by the government from the very start of Western's operations into those points.

b. The government has paid Western an annual return on its investment at those points.

c. Western has received over 3½ million dollars in direct subsidy from the government for the operation of its various routes since 1944. It was directly

subsidized by the government from sometime prior to 1938 until this year.

d. Intervenor, Bonanza Air Lines, Inc., has relieved Western of all leaseholds at those points and has at a reasonable price purchased or otherwise procured from Western (with the exception of a few minor office items) all ground equipment that Western desired to dispose of.

e. Western has wholly failed to establish that it suffered any financial loss as a result of the suspension order. On the contrary, Western's operating experience show that it actually **lost** money at Yuma and El Centro from the outset of its operations to the close of the record in this proceeding.

f. And lastly, the government is not "taking" Western's property for public use! The Board does not and cannot acquire Western's leaseholds. It cannot buy and take title to Western's ground equipment. And if it were to compensate Western for these things, Western could then sell or transfer them to other persons and be paid again for its interest in them.

In view of the foregoing facts it is difficult to conceive that Western could possibly be entitled to any compensation from the government for the suspension of two of some forty-seven points authorized to be served by Western. Western's profits and very existence have been provided for by the government for well over fourteen years. On any balancing of the equities, it would be impossible to establish a debt owing from the government to Western.

6. Western has failed to demonstrate that, by virtue of the standards set up in paragraph 5 of Rule 38 of the Supreme Court, or otherwise, a writ of certiorari should issue to the Court below.

There is no conflict between the circuit courts of appeal on this matter. On the contrary, both the Ninth[21] and Seventh[22] Circuits have disposed of substantially identical issues in a substantially identical fashion — in full support of the Board's suspension power and actions and in clear refutation of the position taken by Western herein.

There is no question of a lower court conflict with applicable local decisions.

There has been no decision on a federal question which could in any way be regarded as probably in conflict with applicable decisions of the Supreme Court.

The lower court's action cannot be construed as a departure from the accepted and usual course of judicial proceedings, or the sanctioning of such a departure by a lower court or other judicial body as to call for an exercise of the Supreme Court's power of supervision.

No decision of the U. S. Court of Appeals for the District of Columbia is involved here.

The decision of the Ninth Circuit Court of Appeals which Western seeks to overthrow does not involve what may properly be regarded as an important question of federal law which has not been but should be settled by this Court, although this is the principal ground on which Petitioner bases its claim that it is entitled to obtain a writ of certiorari.

The Ninth Circuit decision involves a question of fed-

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[21]Western Air Lines v. Civil Aeronautics Board, Case No. 13245, supra.

[22]United Air Lines v. Civil Aeronautics Board, Case Nos. 10544 and 10567, supra. See also Pan American-Grace Airways v. Civil Aeronautics Board, 178 F. 2d 34, 36 (C.A.D.C., 1948), where the court recognized the Boards' power to suspend an entire certificate, if the public convenience and necessity are found by the Board to so require.

eral law, indeed, but one that was for all practical purposes settled in the **Rock Island** case, **supra**... There the Supreme Court upheld I. C. C. action of this nature even though it was undertaken by the I. C. C. **without express statutory authority.** Obviously there would have been no question at all had there been the clear and unequivocal statutory authority (or for that matter any statutory authority at all) that is present in the insant case. Thus the Supreme Court itself has decided this issue, in effect, in a case where the power in question was substantially less clear cut and conclusive than that now under consideration.

In evaluating Western's claim that the present case is of monumental importance to Western it should be observed that only **six one-hundredths of one percent** of Western's total scheduled mileage is involved in this case. Nevertheless, Western urges that if it can be taken out of Yuma and El Centro it can also be taken out of Los Angeles and San Francisco. That apparently is the real crux of their concern, rather than the present suspension action. Presumably, however, Western would in such a situation be fully prepared to demonstrate that the public convenience and necessity would not require Western's temporary removal from those cities — if such were the fact. As to the possibility of such Board action on a more permanent bais, Western would also presumably be able to show that Board action resulting in such a basic transformation in Western's operations would constitute an abuse of the Board's statutory authority or be in excess of the authority actually granted — if such were the fact.

However, those situations are not presented here and

Western's endeavor to have the Court rule on them now is indeed premature, to say the least. Actually such a situation is most unlikely to **ever** arise. And if and when it did, the time would then be appropriate for the Court to consider and pass upon it, in the light of all the facts and circumstances then existing.

The following question[23] which Western puts to this Court unveils the real substance of what Western is here seeking:

> "What, if any, limitations are there on the Board's power to suspend a carrier in the interests of the public convenience and necessity?"

By that question Western is asking the Supreme Court to rewrite the Civil Aeronautics Act, for the Act itself clearly spells out the answer — an answer which Western hopes to have this Court change. Western is also asking the Court to set up arbirtary outside limits to the Board's power and thereby to usurp the Board's functions. It is asking the Court to decide cases not yet presented, on facts not yet known, and thus in advance and in a vacuum to substitute its judgment for that of the Board on the requirements of the public convenience and necessity. It is asking this Court to lay down an inflexible rule to fetter and constrict the agency charged with the responsibility of regulating, developing and promoting a young and dynamic industry whose needs and direction and potential have but barely been probed.

It is inconceivable that the Supreme Court would be willing to cast the future of this rapidly expanding industry in

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[23]Western's petition for Writ of Certiorari, p. 11.

such an unyielding mold by attempting to answer such a question as that for the purposes for which Western desires an answer. On the other hand, the question is so general and sweeping in nature that volumes of erudite analysis and discussion could be poured forth in response to it — and Western could again be provided with the standards and criteria that this Court has on countless occasions before expressed on the various applicable principles involved.

In truth, the only answer which this Court could properly give to the question raised by Western would be to direct Western's attention back to the standards and limitations clearly set forth in the Civil Aeronautics Act and to recapitulate that which Western can easily read from the statute itself.

Western would have the Court believe that the whole industry urgently demands a resolution of these issues by the Supreme Court. Where then is the industry, or any of its constituent members, many of whom have in the past been involved in one way or another with such matters as these? American, United and Capital have been suspended at various points by the Board.[24] Only United has appealed (as previously mentioned), yet it did not see fit to appeal to this Court from the adverse decision of the Seventh Circuit Court of Appeals. It can therefore fairly be said that there is no apparent need at this point to invoke the time and energies of the Supreme Court for a further expression on the principles involved in this proceeding.

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[24]See Piedmont Certificate Renewal case, C.A.B. Order Ser. No. E-6460, decided May 26, 1952, for American and Capital suspensions.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ALBERT F. GRISARD,
Of Counsel
October 1952

APPENDIX A

Legislative History

Air transportation in the United States has, since its inception, been largely a child and ward of the United States government. Prior to 1926, little had been accomplished in aviation beyond the adventure of experimental service. In 1915, President Wilson established the National Advisory Committee for Aeronautics (38 Stat. 930 (1915), as amended 45 Stat. 1451 (1929), 52 Stat. 1027 (1938), 50 U. S. C. Supp. 151 (1938)); that Committee was charged with the duty of supervising, directing and conducting fundamental scientific research and experiment in aeronautics. In the Post Office Appropriation Bill for 1917, $50,000 was set aside for air mail service (53 Cong. Rec. 9624 (June 20, 1916)) but when eight routes were advertised for competitive bids, only one bid was received, and that rejected because the bidder could not give bond. (53 Con. Rec. 2035 (Sept. 2, 1916)). In effect, commercial service did not really get under way until 1918, with the inauguration of the Washington to New York route by **army** flyers carrying the mail (83 Con. Rec. 6629 (May 11, 1938)).

By 1925, it was believed that the air carrier industry had developed sufficiently to shift the service from the Post Office to private contractors, and in that year the Air Mail Act of 1925 (43 Stat. 805 (1925), 30 U. S. C. 461 (1928) was passed. That Act gave the Postmaster the bare right to let contracts for carrying mail to private contractors, and authorized him to make rules and regulations necessary for such transportation. In 1928, the Air Mail Act of 1925 was amended to substitute **route certificates** of not over ten

years duration in the nature of franchises for air mail services. (45 Stat. 594 (1928), 39 U. S. C. 465 (a) 1934)). Under a similar amendment known as the Watres Act, the Postmaster General was given broad economic authority over the carriers by regulating (1) route location, (2) route colsolidations and extensions, (3) contract bidding conditions, (4) service standards, (5) equipment and personnel, (6) accounts, and (7) compensation, including losses from passenger traffic. (46 Stat. 259 (1930) 39 U.S.C. 464 (1934); See also, **Airmail: The Watres Act in Its Workings,** Aviation Magazine, March 1932).

This brief outline of events up to 1930 indicates the nature of the broad regulatory power vested in the Postmaster General, not only with respect to mail srvices, but with respect to the economic regulation of carriers under route certificates. By 1933, Congress believed that the situation was out of hand, that too much money was being paid to support the air service, and an investigation was undertaken headed by Sen. Black from Alabama (now Associate Justice Black of the United States Supreme Court). (See Hearings on Investigation of Air Mail and Ocean Mail Contracts, 73rd Cong., 2nd Sess., pursuant to S. Res. 143 and S. Res. 349 (1934) **and House Report** No. 1956, 72nd Cong. 2d. Sess. (1933); see also, Address by Senator Black delivered on nation-wide hook-up, reprinted 78th Cong. Rec. 2715 (Feb. 19, 1934)). Before that Committee had gone very far, the Postmaster issued a summary order **cancelling all domestic route certificates** as of February 19, 1934 (See, Fagg, **National Transportation Policy and Aviation,** 9 J. of Air L. 155 (1936); Fagg's article is an exnellent review of federal

legislation past and prospective). Injunction proceedings by the carriers against this summary cancellation of their route certificates were wholly unsuccessful, and the summary action of the Postmaster upheld. **(Transcontinental and Western Air Inc.** v. **Farley,** 71 F. (2d) 287 (2d Cir., 1934). Under Executive Order by President Roosevelt, the army took over all operations (Fagg, **supra,** p. 169) and Congress passed a statute authorizing the necessary transfers of personnel, property and appropriations (Public L. 140, 73rd Cong. 2d Sess., Mar. 27, 1934).

The result of the Committee's investigation was the enactment of the Air Mail Act of 1934 (48 Stat. 933 (1934), 39 U.S.C. 463 (1934); see, **Some Implications of the Air Mail Act of 1934,** 47 Yale J. 465-9 (1934). At the same time, Senator McCarran, a member of the Black Committee, introduced the first of a long series of bills providing for an independent agency to regulate the economic and safety aspects of air transportation (see, S. 3187, 73rd Cong., 2d Sess. (1934) but the bill was defeated.

The Air Mail Act of 1934 made the air carrier industry subject to federal regulation from three sources: the Post Office awarded contracts and determined schedules; the I. C. C. fixed rates; and the Bureau of Air Commerce licensed aircraft and personnel and operated the airways and provided safety regulations. The Act also contained a provision for the appointment of a Federal Aviation Commission to make a study of the whole aviation problem and report back to Congress (See **Report of the Federal Aviation Commission,** Sen. Doc. 15, 74th Cong., 1st Sess. (1935)).

In 1935, Congress passed an amendment prohibiting

"off-line" service if such service would in any way compete with the service available on an air mail route. (49 Stat. 619 (1935), 39 U. S. C. Supp. 469 (n) (1935). This amendment made expansion almost entirely dependent on air mail contracts and the industry was, for all practical purposes, frozen temporarily (see **The Economic Regulation of Air Transport**, 5 U. Chi. L. Rev. 471.7 (1938)).

Between 1934 and 1938, the aviation industry was under the control of the Post Office, and its development wholly dependent upon grants from that branch. The plenary power in the Postmaster to issue a "death sentence" against a carrier, almost at will was never successfully challenged (see, **e.g., Boeing Transport v. Farley,** 75 F. (2d) 765 (D. C. Cir. (1935) **cert. den.**, 294 U. S. 728 (1936)); **Pacific Air Transport** v. **Farley,** decided with the **Boeing** case, **supra; Pennsylvania Airlines** v. **Farley,** 75 F. 2d 769 (D. C. Cir. 1935"; Note, **Air Mail Cancellation of Contracts by the Postmaster General,** 6 Air L. Rev. 59, (1936)).

But during the period from 1934 to 1938, the entire matter was still being pursued by Congress in an attempt to achieve some sort of stability and to find procedures whereby a proper balance between government regulation and carrier fredom could be achieved. (A list of Bills considered by Congress during that period is contained in Appendix A of Rhyne, Civil Aeronautics Act Annotated (1939 189). In January 1935, the Federal Aviation Commission submitted its report with 192 recommendations based on its study (Sen. Doc. No. 15, 74th Cong. 1st Sess. (1935)). That Commission recommended that "All regular domestic scheduled transport operations should require a certificate

of convenience and necessity, to be issued by the Commission . . . Such a certificate should not be cancelled except for good cause without equitable compensation to the holder." On the same day, Congressman Lea introduced a bill which embodies most of the recommendations of the Commission (H. R. 5174, 74th Cong., 1st Sess (1935); see, Wigmore & Fagg, **An Explanation of the Lea Bill,** 6 J. Air L. 184 (1935)). But President Roosevelt objected to the creation of an independent authority with broad powers to regulate air commerce (see, Message of President Roosevelt which accompanied the **Report of the Federal Aviation Commission, supra.**) despite the favorable recommendations along those lines from the Commission. (The **Commission's report** had said: " 'The Commission so created should have broad supervisory and regulatory powers over civil aeronautics, and particularly over domestic and foreign transport." **Report, supra,** Sen. Doc. No. 15 at 243). Senator McCarran introduced a bill to carry out the **President's** recommendations (S. 3027. 74th Cong., 1st Sess. (1935)) which was expressly patterned upon **existing** federal regulation of transportation. (See Rhyne, **supra,** at 44). That bill would have put the regulation of aviation under the I. C. C. with regulatory powers practically **identical** with those possessed by the Commission over motor carriers and water carriers (see Part II and III of the Interstate Commerce Act, 49 Stat. 548, as amended, 54 Stat. 919, 49 U. S. C., 312 (1946); 54 Stat. 929, 49 U. S. C. 901 (1946)). After hearings (see, **Hearings on S. 3027,** Before a Subcommittee of the Committee on Interstate Commerce, 74th Cong. 1st Sess. (1935)) the bill was rewritten and re-introduced as S.

3420, (74th Cong. 1st Sess. (1935)). The Committee Print of S. 3420, dated Aug. 29, 1935 has a caption which states:

> "This print . . . shows derivation and comparability of the various sections of this bill with the provisions of Motor Carrier Act, 1935, Interstate Commerce Act, . . . and bill for the regulation of waterways . . . "

(See also, comparative print of S. 3027, 74th Con. 1st Sess. 1935).

For our purpose here, the provisions of section 405 (m) of S. 3027 show the prevailing philosophy of the day induced by President Roosevelt's reaction to an independent commission with broad regulatory powers. That section, which is very similar to the component provision in the present Motor Carrier Act, provided:

> "Any certificate may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or upon the Commission's own initiative, after notice and hearing be suspended, changed, or revoked, in whole or in part, for willful failure to comply (with the law)"

A like provision, for all practical purposes is contained in H. R. 5234 (75th Cong. 1st Sess. (1937) section 305(j). This provision was also patterned on the Motor Carrier Act (see, testimony of Commissioner Eastman, **Hearings on H. R. 5234**, Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 1st Sess. (1937) at p. 41). By the end of 1937, the House and Senate had agreed for all practical purposes on legislation to regulate the economic phases of air transportation (See S. 2, 75th Cong. 1st Sess. (1937) and H. R. 5234, **supra.**). House Report No. 911 (75th Cong. 1st Sess. 1938)) said of the two

versions:

> "The fundamental purpose of this proposed legislation is to extend to the Interstate Commerce Commission regulatory powers over air transportation, **generally similar** so far as applicable, **to the powers** it now exercises over rail and motor transportation."

Had Congress proceeded to adopt the legislation as proposed, and particularly as reflected in Sections 405 (m) of H. R. 5234 and 305(j) of S. 3027, the petitioner in this proceeding would be correct in asserting that the Board is without authority to suspend or alter a certificate except on application from the holder, and could not otherwise suspend or revoke except for knowing and willful violation of the law. But the plain fact is Congress did **not** adopt any of the legislation so proposed. President Roosevelt then appointed an Interdepartmental Committee to review the whole picture and to make necessary recommendations with respect to **who** should regulate aviation, and **what powers they should be given in order to establish and maintain a sound** air transportation system. (See **Hearings on H. R. 9738**, Before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong. 3rd Sess. (1938)). That Interdepartmental Committee was composed of representatives of six executive agencies, and took voluminous testimony of all interested parties both in government and industry. But the I. C. C. was not appointed to the Committee, and "was intended to have its feathers plucked" (See remarks of Rep. Withrow, 83 Cong. Rec. 6505 (May 9, 1938). While Congress was not in session during the late summer and early fall of 1937, this Com-

mittee undertook its long and extensive hearings for the revision of the bills. President Roosevelt at about the same time revised his views and announced that he **favored** an **independent authority, with broad powers to regulate the industry** (83 Cong. Rec. 6628 (May 11, 1938).

All this study, revision, reorganization and the like resulted in H. R. 9738 (75th Cong. 3rd Sess. (1938)), in which Congressman Lea embodies the recommendations of the Interdepartmental Committee. (See, **Hearings on H. R. 9738, supra.)** Mr. Hester, Ass't. General Counsel of the Treasury and Fred D. Flagg, Director of Air Commerce appeared and testified with respect to the work of the Interdepartmental Committee. No official record of the Interdepartmental Committee's work is available, but this bill, Mr. Hester said, "embodies the unanimous recommendations of the six executive departments . . . " (Id. at p. 2)

Thus after a complete restudy of the legislation previously proposed, and in the light of the new philosophy that had taken hold that aviation should be under **a newly created and independent authority with broad regulatory powers,** H. R. 9738 was drafted to reflect the new philosophy **(Hearings on H. R. 9738, supra.)**. A comparison of **Section 402(k)** of this new legislation with **Section 405(m)** of the earlier versions in S. 3027 shows conclusively the intention to arm the new authority with **power to supervise on a continuing basis,** where the I. C. C. was empowered with no such authority. Section 402(k) of the 1938 revisions reads as follows:

> "The Authority upon petition or complaint or **upon its own initiative** after notice and hearing, **may alter,**

amend, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with (the law)"

Thus, where the I. C. C. under the earlier versions would have had power to alter or amend **only upon application of the holder, the new Authority was empowered to act "on its own initiative" when the public convenience and necessity required such a change.** The power to revoke only for knowing and willful violation of the law remained the same. This marked change in the language makes it obvious that the provisions permitting action by the Board to protect the public convenience and necessity irrespective of carrier will or carrier violations were intentionally drafted as they now read. The same is apparent from House Report No. 2254 (75th Cong. 3rd Sess. (1938)). That report says that the purpose of the legislation was to create an independent agency and "to authorize the new agency to perform **certain new regulatory functions** which are designed to stabilize the . . . industry." (Id., p. 1)

Other revisions of the bill were proposed in both Houses of Congress (See, Rhyne, **supra,** at **p. 54 et seq.)** but the provisions of Section 402(k) of H. B. 9738 remained substantially unchanged except to add the power to **modify** (again showing the deliberate care given this particular provision), and the bill so read as finally adopted by Congress. (Public L. 706, 75th Cong. Ch. 601, 3rd Sess., 52 Stat. 973 (1938) 49 U. S. C. 481 **et seq.** (1946)).

With respect to the broader power given the new authority Rhyne has said:

> "While the economic provisions of the Act are admittedly modelled upon the ideas already enacted into law in various provisions of the Interstate Commerce Act, the wording and draftsmanship of the Civil Aeronautics Act of 1938 represents a vast improvement upon that of the provisions of the Interstate Commerce Act. If the suggested revision in the Interstate Commerce Commission . . . , based upon the experience under the Civil Aeronautics Act, comes to pass, it might be well to revise the wording of certain of the regulatory provisions of the Interstate Commerce Act." (Id. at 95)

(See also, Hester, **The Civil Aeronautics Act of 1938,** 9 J. Air L. 451 (1938)). And even under the earlier proposals for economic regulation over air carriers, Commissioner Eastman of the I. C. C. had said:

> "The declaration of policy also makes it clear that we must be guided in our regulation by the peculiar conditions of air transportation, rather than by conditions in other forms of transportation."

(See, **Hearings on S. 3027, supra,** at p. 37). Mr. Edgar S. Gorrell, President of the Air Transport Association whose membership consisted of almost every airline in the country, testified before the same Committe that,

> "We realize that our industry is, peculiarly, one affected with the public interest. No other is so intimately bound up with the demands of our national Government both in peace and in war time." (Id. at 53)

Further evidence of the change wrought in the Interdepartmental Committee with regard to the regulatory powers to be given the new commission is seen in the revision of the earlier proposals with respect to grandfather rights. The previous proposals would have made the granting of a certificate to any carrier operating prior to the adoption of the

Act mandatory upon the I.C.C. (See, **e.g.**, S. 3027, **supra.**). But as proposed and as finally adopted after the Interdepartmental Committee study, grandfather certificates were not mandatory, and the Act expressly gives the Board the power to **deny or alter** prior existing routes if "the service rendered by such applicant . . . was inadequate and inefficient" (Section 401(e) of the Civil Aeronautics Act; see, **Hearings on H. R. 9738, supra,** at p. 39). Thus, even with respect to **prior existing rights,** the Board was empowered to correct inadequacy or inefficiency. Section 401(h) carries over that power, among others, into future proceedings in order that the Board might supervise, on a continuing basis, the operations under a certificate so as to insure that the public convenience and necessity, as defined in Section 2 of the Act, is protected.

Further evidence of the authority to supervise on a continuing basis even the rights held before the Board was established is seen in Section 1108 of the Act as adopted. Under that section, "All orders . . . , permits, contracts, **certificates, licenses,** and privileges . . . issued (before the Act) shall continue in effect until **modified, terminated, superceded, set aside** or repealed by the Board . . . "

Needless to say, certificates of public convenience and necessity granted until Title IV of the Act were intended to give stability to the carriers, but that aim is subordinate to the intent to protect the paramount public interest in he development of an air transportation system properly adapted to the declaration of policy in Section 2 of the Act. (See, **Hearings on H. B. 5234, supra,** at p. 66 **et seq.**) It was certainly never understood, by the industry, which had

been used to summary action by the Postmaster General, that route certificates were to be regarded as wholly inviolate. As a matter of fact when some question arose as to the permanence of certificates, Mr. C. R. Smith, President of American Airlines, testified that certificates of **unlimited duration** were preferable from the **attractiveness** to investor standpoint, but should be, he thought, subject to **suspension for cause.** "There would be no occasion," he said, "to issue a certificate for a limited time **as long as the Commission is given authority to cancel it." (Hearings on S. 3027, supra,** at p. 50.) And Mr. Gorrell, testifying on H. R. 5234 (**supra,** at p. 68) said:

> "We should proceed a step at a time, giving **both public administration and private management** an opportunity to learn new lessons and **to un-learn old ones that may prove false."**

The Civil Aeronautics Act of 1938, as finally adopted, had inherent in it these philosophies. The Board may grant a certificate for an unlimited period under 401(d) (1) or for a temporary period under 401(d) (2), but whether the certificate is granted for an unlimited period or for a temporary period, Section 401(g) provides that unlimited certificates shall remain in effect until "suspended or revoked as hereinafter provided," **and** in the case of temporary certificates issued under 401(d) (2) those certificates too shall remain in force and effect until the date specified therein, "unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein . . . " Thus 401(g) negates any belief that certificates issued for an unlimited period may not be suspended; it expressly distinguishes between unlimited certificates and temporary

certificates, and makes **both** subject to suspension.

The Act, its legislative history, and its obvious intent and purpose show conclusively that the Board has a continuing power of supervision and may act to alter a certificate whenever the public convenience and necessity so requires. In this respect it was no accident that the Act is broader than the power given the I. C. C. under the Interstate Commerce Act. The Board was armed with authority to "unlearn" its errors and to act in accordance with the requirements of the public convenience and necessity as those requirements through experience manifest themselves from time to time. To deny the Board that power is to turn back the clock to a restrictive philosophy which was expressly and intentionally replaced by Congress, and to "un-learn" all the experience Congress had under the provisions of the Interstate Commerce Act. For example, the Ass't. Secretary of Commerce, commenting on Section 305(j) of H. R. 5234 said that to permit certificates to be inviolate except for "willful violation" would "clearly serve to place an undue burden on the Government"; (See, **Hearings on H. R. 5234, supra)** and his fear did not go unheeded; the revisions as reflected in the present Act remove that element when the public convenience and necessity require the action, but admits it when the carrier is charged with violations. The "good cause" for suspension is the public convenience and necessity.

There can be no doubt therefore, that Congress established a dual standard for control over certificates. It gave the Board an **economic sanction** to be employed when the public convenience and necessity required a change and it

gave the Board a penal sanction in revocation when the carrier intentionally violated the laws. It permitted the Board to act constructively in the future to achieve through administrative flexibility the high purposes of the Act. (See Landis, **The Administrative Process**, 69, 78 (1938)). To read the Act otherwise does violence to its purposes and intent, and makes a nullity of its express provisions.

APPENDIX B

Excerpts from The Civil Aeronautics Act of 1938, As Amended

Declaration of Policy

Section 2 (49 U.S.C. 402). In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Certificate of Public Convenience and Necessity

Certificate Required

Section 401 (49 U.S.C. 481). (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

* * * *

Issuance of Certificate

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to

conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

* * * *

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

* * * *

Effective Date and Duration of Certificate

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection

(d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased.

* * * *

Authority to Modify, Suspend, or Revoke

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Transfer of Certificate

(i) No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

Certain Rights Not Conferred By Certificate

(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Application for Abandonment

(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

* * * *

Requirement As to Carriage of Mail

(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Tarifffs of Air Carriers

Observance of Tariffs; Rebating Prohibited

Section 403 (49 U.S.C. 483). (b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any

manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or inter-changing tickets or passes for free or reduced rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe.

Rates for Carriage of Persons and Property

Carrier's Duty to Provide Service, Rates and Divisions

Section 404 (49 U.S.C. 484). (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges,

and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * *

Rates for Transportation of Mail

Rate-Making Elements

Section 406 (49 U.S.C. 486). (b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the

character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * *

Consolidation, Merger, and Acquisition of Control Acts Prohibited

Section 408 (49 U.S.C. 488). (a) It shall be unlawful, unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged

in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics.

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Power of Board

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolida-

tion, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: **Provided,** That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: **Provided further,** That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

* * * *

Prohibited Interests

Interlocking Relationships

Section 409 (49 U.S.C. 489). (a) After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or

director who is an officer, director, or member, or who as a stockholder holds a cotrolling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly, and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

* * * *

Loans and Financial Aid

Section 410 (49 U.S.C. 490). The Board is empowered to approve or disapprove, in whole or in part, any and all applications made after the effective date of this section for or in connection with any loan or other financial aid from the United States or any agency thereof to, or for the benefit of, any air carrier. No such loan or financial aid shall be made or given without such approval, and the terms and conditions upon which such loan or financial aid is provided shall be prescribed by the Board.

Pooling and Other Agreements

Filing of Agreements Required

Section 412 (49 U.S.C. 492). (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign

air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

* * * *

Classification and Exemption of Carriers

Classification

Section 416 (49 U.S.C. 496). (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

* * * *

Judicial Review of Board's Orders

Findings of Fact by Board's Conclusive

Section 1006 (49 U.S.C. 646). (e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.